

# Antitrust Compliance in Latin America

*Compliance and Ethics Committee of the American Bar Association Antitrust Law Section and  
Competition Center of the Adolfo Ibáñez University in Chile*

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## ANTITRUST COMPLIANCE IN LATIN AMERICA

*Compliance and Ethics Committee of the American Bar Association Antitrust Law Section (ABA) and Competition Center of the Adolfo Ibáñez University in Chile (CeCo)*

*Several Latin American jurisdictions have introduced substantial fines and even criminal sanctions for antitrust violations in the past decades. This has been accompanied by an increasing tendency among firms to adopt compliance programs in antitrust matters. Nevertheless, to this day it is still unclear how developed these countries are in promoting and recognizing compliance programs and what is the level of complexity of antitrust compliance programs implemented by companies in the region. In this paper, we collect information from recognized private practitioners from seven countries of Latin America (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru) through a survey with 32 questions on antitrust compliance programs. Furthermore, we interviewed a local authority and a practitioner from each of these countries on the results of the quantitative survey. We hope that the results of the survey and interviews shed light on the characteristics and levels of development of antitrust compliance programs in Argentina, Brazil, Chile, Colombia, Ecuador, Mexico and Peru.*

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## I. INTRODUCTION

In the past decade, there has been an increasing tendency among companies and state-owned enterprises to adopt compliance programs. Since different authorities and regulators have included compliance in their agenda, either by publishing recommendations on implementing compliance programs, or imposing them as a remedy in certain procedures, compliance programs have gained prominence. Antitrust is not an exception.

According to the Organization for Economic Co-operation and Development (OECD), nowadays an increasing engagement of antitrust agencies with preventive compliance efforts has emerged, compared to the situation ten years ago, where authorities were primarily passive observers of developments in the corporate sphere.<sup>1</sup> In the US, for example, the Department of Justice (DoJ) undertook a policy change with the publication of its guideline on the evaluation of corporate compliance programs in criminal antitrust investigations in 2019.<sup>2</sup> With this new guideline, the DoJ now not only considers compliance programs as tools for the prevention and detection of anti-competitive conduct but also as factors that can be taken into account to grant benefits when charging and sanctioning a company in a criminal procedure.<sup>3</sup>

In Europe, under a more restrictive approach –since compliance programs do not justify fine reductions– the Commission has also emphasized that agencies should encourage compliance programs as effective means to avoid the occurrence and relapse of illegal behavior.<sup>4</sup>

Many Latin American countries have been closely following jurisdictions such as the US and the EU. Nevertheless, it is still unclear how most developed Latin American countries on antitrust are in promoting and recognizing compliance programs and what is the actual level of seriousness and effectiveness of the antitrust compliance programs that companies are implementing in the region.

With that purpose, the Compliance and Ethics Committee of the American Bar Association Antitrust Law Section (ABA) along with the Competition Center of the Adolfo Ibáñez University in Chile (CeCo) conducted the first Latin American study on the perception of practitioners (private practice attorneys) and enforcers concerning compliance programs in antitrust matters. This study aims to collect information from the most prominent practicing lawyers in seven jurisdictions of Latin America (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru) and compare it to the enforcers' opinions on these topics.

The specific objectives of this research were to collect outstanding information on the following relevant topics related to antitrust compliance programs:

**a) How compliance programs are regulated and recognized in each country.** This topic includes a review on enforcer's guidelines on how to develop effective programs, specific benefits antitrust authorities provide to companies' compliance implementation and whether attorney-client privilege cover documents of this nature.

**b) Which are the characteristics and level of complexity of compliance programs applied in practice by com-**

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1 In 2011, only a few agencies had published compliance guidance. In contrast, at least 20 guidance documents were published by different agencies within the last five years. OECD, Executive Summary of the roundtable on Competition Compliance Programmes, Working Party No. 3 on Co-operation and Enforcement, *OECD's Directorate for Financial and Enterprise Affairs Competition Committee* (2021), [https://one.oecd.org/document/DAF/COMP/WP3/M\(2021\)1/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2021)1/ANN2/FINAL/en/pdf).

2 DOJ, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (2019), <https://www.justice.gov/atr/page/file/1182001/download>.

3 As in the European Union, the position of the DoJ Antitrust Division until before 2019 was characterized by considering compliance programs as tools for the prevention and detection of anticompetitive conduct, but not as factors to be taken into account when sanctioning an infringing company.

4 European Commission, Directorate-General for Competition, *Compliance matters: what companies can do better to respect EU competition rules*, Publications Office (2013), <https://data.europa.eu/doi/10.2763/60132>.

**panies of the region.** This topic includes an analysis on which types of companies are interested in implementing compliance programs and why; what is the level of development of compliance programs in each country; what is the content that companies usually incorporate into compliance programs and the frequency on which they are reviewed; and whether the regulation and implementation of antitrust compliance programs abroad have any influence in the region.

**c) What is the practitioners' perception on the importance and effectiveness of compliance programs in the region.** This topic includes a review of the experts' perception on the level of importance that compliance programs have had in the last years in Latin America, how they think this will progress in the future and if there are any initiatives in course aiming to encourage the implementation of compliance.

## ■ II. METHODOLOGY

As per our methodology, we used both quantitative and qualitative perspectives.

In the first place, we sent a survey with a total of 32 standard questions to 60 prominent and experienced lawyers in antitrust law from Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru, in order to search for their perception on the topics described above. To select the sample, we analyzed the lists of attorneys focused on antitrust law practice in each country, drawn up by the external global organization Chambers and Partners (Chambers). The number of selected practitioners varies by country, chosen according to their classification on the Chambers Ranking<sup>5</sup> (i.e. Band 1, Band 2, Star Individuals, and Eminent Practitioners).<sup>6</sup>

It is worth noting that, as the selection of attorneys was made according to the Chambers ranking, the sample is not representative of the experience of all lawyers in each country. It only shows the perception and experience of a select and small group of practitioners.

Secondly, once the information from the survey was processed, we interviewed one representative of the local authority and one practitioner of each country to receive their comments on the results and their implications.

Overall, this document shows the results of the survey and the interviews conducted on compliance programs in antitrust matters and concludes with a diagnostic of the current development on the subject in each country and the region as a whole.

We are aware that the research methodology mainly follows a qualitative approach, driven by the impressions, opinions and experience of different stakeholders with diverse backgrounds.

The results are grouped into six sections, each one addressing different angles and features to understand the broader picture: the past and current state of regulation and implementation of antitrust compliance programs in Latin America. Section III summarizes the overall investigation results. Aggregated information on the respondents of the survey, their experience, and the jurisdictions in which they currently practice can be found in Section IV. Section V deals with the regulation and recognition of compliance programs in each country and the region. Section VI analyzes the characteristics and level of complexity of the antitrust compliance programs applied by companies of Latin America. Finally, Section VII

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<sup>5</sup> According to their [website](#), Chambers and Partners is a recognized independent research company that delivers detailed rankings and insight into the world's leading law firms and individual lawyers. They are ranked from Bands 1 (highest) to 6 (lowest) based on technical legal ability, professional conduct, client service, diligence, commitment, among others. Star Individual is given to lawyers "with exceptional recommendations in their field" and Eminent Practitioners is given to "highly influential lawyers" that are "less active in fee-earning work but remain key players in the team".

<sup>6</sup> According to the Chambers Latin America 2022 Ranking. Available at: <https://chambers.com/legal-guide/latin-america-9>

studies the experts' perception on the importance and effectiveness of compliance programs in the region, and Section VIII concludes.

### ■ III. OVERALL RESULTS

Nowadays, antitrust authorities have engaged in a growing effort to implement and improve compliance programs in their jurisdictions, according to the OECD. Even when the trend has been followed by some Latin American authorities, there is no clarity on the level of development these countries have achieved. Hence, the aim of this research is to shed some light in the Latin American panorama, through a standard survey and one-on-one interviews with prominent practitioners and antitrust authorities from the region.

As expected in a region composed of countries with economic, social, and cultural differences, the panorama is heterogeneous among jurisdictions. However, there are certain common trends, as we will see.

For example, the results of the survey and the interviews show that, in general, compliance programs in the region are important for agencies, and practitioners and the companies they advise, especially if they are international corporations. This importance has increased over time. In this vein, most countries in the region have some type of regulation on compliance programs and antitrust agencies have increasingly opted for granting benefits to companies that implement compliance programs.

However, the survey detects certain areas that could be improved. In general, compliance regulation or precedents could be further specified or developed in order to better clarify the eventual benefits (such as fine reduction or a way to reach a settlement agreement) that antitrust agencies could grant to companies that have implemented a serious compliance program or will implement it in the future. Also, the scope of professional secrecy could be strengthened in relation to compliance programs. As to the content of compliance programs, there is still space to improve regarding the characteristics that compliance officers should meet, the incorporation of periodic reviews and audits, the involvement of economists, and the use of more advanced technologies and screening techniques in designing and implementing compliance programs.

The main results obtained from the survey and interviews are as follows:

**1) Compliance regulation/guidelines.** The results of the survey show the existence of different administrative regulation sources of antitrust compliance in each of the countries.

- According to the information recollected through the interviews of authorities and practitioners, Brazil, Ecuador, Chile, and Peru have specific guidelines issued by antitrust authorities dedicated exclusively to grant orientation on antitrust compliance.
- In the case of Colombia, although they do not have guidelines with these specific characteristics, at the end of 2020, the SIC<sup>7</sup> promoted the issuance of a technical standard on antitrust compliance, which was issued by the Colombian Institute of Technical Standards and Certification.
- In the case of Mexico, although there would be no specific guidelines exclusively on antitrust compliance, COFECE<sup>8</sup> has issued the guideline “Recommendations to Comply with the Federal Law of Economic Competition”, which is one of the main tools that companies in Mexico use to develop compliance programs.

7 Superintendencia de Industria y Comercio.

8 Comisión Federal de Competencia Económica.

- On the other hand, Argentina does not have any guidelines intended to provide guidance on antitrust compliance.

As of legislative references, there would only be an explicit legal mention to antitrust compliance in the Peruvian Competition Law.

**2) Compliance judiciary precedents.** In relation to the existence of precedents, except for the cases of Chile and Peru, the authorities and attorneys from Argentina, Brazil, Ecuador, Colombia and Mexico indicated that there are no specific judicial precedents regarding antitrust compliance. However, most of the countries have administrative precedents in which the antitrust authority has accepted the implementation of a compliance program as a condition for a settlement agreement, for closing an investigation or approving a merger. Some of the countries also show precedents in which the antitrust authority has imposed the implementation of compliance programs as corrective measures, along with the sanction of anti-competitive conducts.

**3) Benefits antitrust authorities could provide in relation to compliance.** All in all, the practitioners from the countries under study tend to show disagreement in relation to whether the antitrust authorities could provide incentives or benefits to companies that implement compliance and the types of benefits that could be granted. These could be explained by several reasons.

- In the case of Brazil, Ecuador, and Chile, although the compliance guidelines of their antitrust agencies explicitly indicate the possibility of granting fine reductions or other benefits to companies that have implemented a compliance program before the infraction, or that commit to implement a compliance program in the future, the benefits are defined on a case-by-case basis.
- In Peru, the authority explicitly indicates the percentage of fine reduction that INDECOPI<sup>9</sup> could grant and in which cases could be granted.
- In the case of Colombia, although the antitrust authority does not have a guideline that explicitly establishes the possibility of granting benefits to companies, in practice, the SIC has recently been granting incentives to companies that commit to implement compliance programs in the future.
- In the case of Argentina and Mexico, there seems to be a less clear and defined policy in this regard.

**4) Protection of attorney-client privilege over compliance reports or audits.** According to the survey and the interviews, although there is a general norm that protects legal privilege, in most of the countries under study there are no specific regulations or precedents that protect legal secrecy in antitrust matters, neither a regulation that especially protects the documents or memorandums that attorneys could produce while implementing or monitoring an antitrust compliance program. In this regard, most lawyers (82%) believe that the recognition of the legal privilege over compliance programs documents or reports could encourage companies to apply more serious and effective programs.

**5) Origin of companies' antitrust compliance efforts.** In the study, we also explored the reasons that motivate companies to develop and implement compliance programs in the first place. Digging into the motives could help understand if (and which) agencies' policies could help promote the application of compliance programs.

- The survey revealed that in the experience of about 44% of the respondents, companies' efforts in applying

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<sup>9</sup> Instituto Nacional de la Defensa de la Competencia y de la Protección de la Propiedad Intelectual.

compliance programs originate as part of corporate group policies. However, the rest indicated reasons that are directly related to the antitrust regulation and its enforcement by authorities: 37% referred that this interest originates when the industry to which the company belongs has been under the review of antitrust authorities, 11.1% considered that the decision of applying antitrust compliance programs originates after a reform to the antitrust regulation has been implemented, and 7.4% stated that the origin comes after the company has been sanctioned by the antitrust authorities.

- An obligation from antitrust authorities or a settlement arranged with the authority to close an investigation or approve a merger can also explain why a company decides to implement a compliance program or improve a pre-existing one. In our survey, 80.6% of the attorneys answered that in their jurisdictions this obligation could be required as a result of a sanctioning procedure or investigation for anticompetitive conduct by the company (for example, as an obligation together with the imposition of a fine for a cartel case), 72.2% as a condition for probation, closure of an investigation or a settlement agreement with the antitrust authority, and 44.4% as a required measure when approving a merger.

**6) Characteristics and complexity of Latin American compliance programs.** According to the attorneys' experience, the elements usually included in compliance programs are the training of executives and managers (92.6%), the development of companies' antitrust compliance guidelines or manuals (77.8%), and the appointment of a compliance officer (66.7%). However, other important elements such as the periodic internal audits of executive's communications, the periodic tests of the effectiveness of implemented antitrust compliance programs, and the review of internal disincentives to comply with antitrust regulation (i.e. ambitious performance goals and performance based salary schemes) did not generate as much consensus as to their general application by companies in the region.

Furthermore, while most companies include the designation of compliance officers in their programs, in Latin American lawyers' experience, usually they are not officials outside of the company, they are not experts on antitrust matters nor independent of the top executives of the firm and do not report directly to the Board of Directors.

**7) Obstacles for implementing serious and effective antitrust compliance programs.** When asked to rate the seriousness and comprehensiveness of the antitrust compliance programs applied by companies of their country, on a scale of 1 to 10, 70% of the lawyers considered a value higher than 5, meanwhile, 30% considered a lower value. Nonetheless, the average showed differences by jurisdiction. The highest mean was for Mexico (7.3), followed by Brazil (7), and Chile (6.8). The lowest mean was for Colombia (5.1) and Ecuador (5.5).

Notably, the main reasons adduced by the attorneys of countries like Chile, Brazil, Ecuador, Mexico, and Peru were more related to decisions or internal actions within the companies, such as the lack of corporate culture and commitment of senior executives to the importance of complying with antitrust regulations and the lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs. In contrast, attorneys from Argentina and Colombia mentioned reasons more related to the actions of antitrust agencies: in Argentina, the absence of relevant fines or dissuasive sanctions by antitrust authorities was one of the main reasons mentioned. Also, in Argentina and Colombia, the lack of clear guidelines or precedents by authorities on compliance programs was another important reason.

**8) Participation of economists and non-legal professionals in antitrust compliance.** According to attorneys' experience, generally, there would be no significant participation of non-lawyers (such as economists) in the design, implementation, or monitoring of antitrust compliance programs in Latin America. The fact that compliance is usually a topic related to the legal profession, and the higher costs that economist participation in compliance programs implies, are some of the reasons given by attorneys to explain these results.

**9) Use of forensic software, algorithms, or artificial intelligence to detect anticompetitive conducts.** Our survey

revealed that, in attorneys' view, no jurisdiction is advanced in the use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors within companies. Furthermore, most jurisdictions barely use special software or hire external computer experts, or forensic companies to review internal communications in the context of antitrust compliance audits. Most of the practitioners mentioned that the limited use of these tools could be explained by the high costs that they imply for the companies or the fact that they are just beginning to be implemented in the region. Notably, compared to the other jurisdictions, Brazil and Mexico showed further developments in this subject.

**10) Influence of foreign regulation and implementation of antitrust compliance programs.** Regarding the level of development of antitrust compliance in Latin America, the survey also showed that in the respondents' view, most subsidiary companies in the region have adopted antitrust compliance programs influenced by parent companies abroad.

On the other hand, when asked about how regularly companies follow guidelines or legal precedents of foreign antitrust authorities when designing and adopting their antitrust compliance programs, the answers were more heterogeneous between jurisdictions, having a mean of 6.7 points (in a scale from 1 to 10). In this regard, when asked about the jurisdictions they usually look when counseling clients on antitrust compliance, practitioners from Brazil, Ecuador, Chile, and Mexico mentioned United States as the jurisdiction of reference.

**11) Importance and future developments of antitrust compliance.** While for 46.3% of the attorneys, antitrust compliance programs have great effectiveness and they make it possible to early detect anti-competitive behaviors inside companies, the remaining 50% is more skeptical about the level of effectiveness of antitrust compliance programs. Still, there is hope for improvements in the adoption rate of compliance programs in antitrust matters as 81.5% of the respondents believe that in the last five years the implementation of antitrust compliance programs by companies in their country has increased.

On the same vein, when we asked the authorities if the incentive and development of antitrust compliance programs is a priority or if they have future projects to encourage compliance, all of the authorities, although with different intensities, stated that this issue is a priority for them.

Finally, and regarding variables that could help increase the implementation of compliance programs, 79.6% of the attorneys affirmed that an increase in the fines or sanctions for anticompetitive conducts could incentivize the implementation of more compliance programs.

## ■ IV. GENERAL INFORMATION

On December 6th, 2021, the survey was mailed to 60 prominent and experienced lawyers in competition law, from seven relevant jurisdictions in Latin America. On January 22nd, 2022, the survey was closed and answered by 90% of the sample (54 out of 60). Moreover, in every single country<sup>10</sup> of the sample, the response rate was 100%, except for Brazil, where the response rate decreases to 62.5% (10 out of 16).

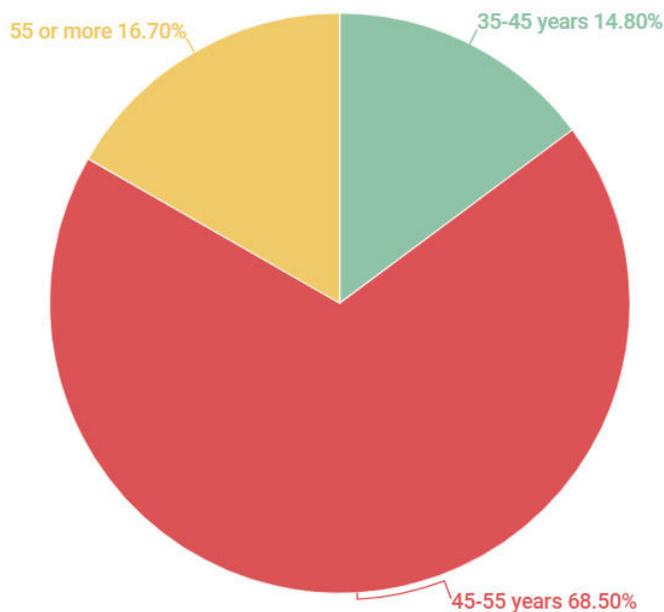
10 Question 1 from the Questionnaire. "1. Country in which you currently practice: a. Argentina, b. Brazil, c. Chile, d. Colombia, e. Ecuador, f. Mexico, g. Peru".

**Figure 1: Number of answers by country**



As Figure 2 shows, the vast majority (68.5%) of surveyed attorneys are between 45 and 55 years old<sup>11</sup>, 16.7% are over 55 years old, and the remaining 14.8% are between 35 and 45 years old.

**Figure 2: Lawyers age**



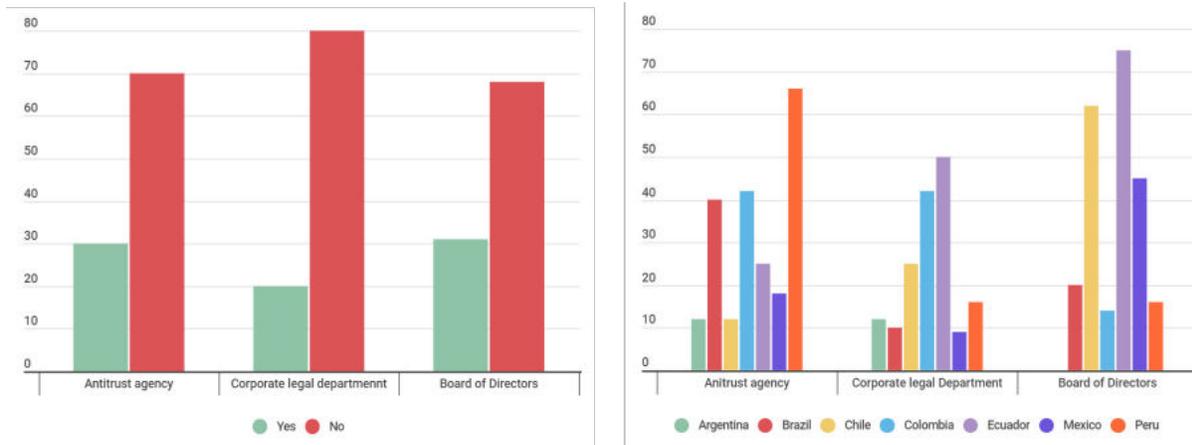
When asked in which sectors (different from their private law firm) they have worked<sup>12</sup>, 31.5% had, at some time of their

<sup>11</sup> Question 2 from the Questionnaire. “2. What is your age? a. 25-35, b. 35-45, c. 45-55, d. 55 or more”.

<sup>12</sup> Question 3 from the Questionnaire. “3. Have you worked in these sectors? a. Private law firm: Yes/No, b. Antitrust agency: Yes/No, c. Corporate legal department: Yes/No, d. Board of directors: Yes/No”.

careers, been a member of a Board of Directors, 20% have worked at a corporate legal department, and 30% at an antitrust agency, as seen in Figure 3a. The highest rate of individuals who previously worked in an antitrust agency comes from Peru and Colombia; in a corporate legal department from Ecuador and Colombia; and in a Board of Directors from Ecuador and Chile, as Figure 3b shows.

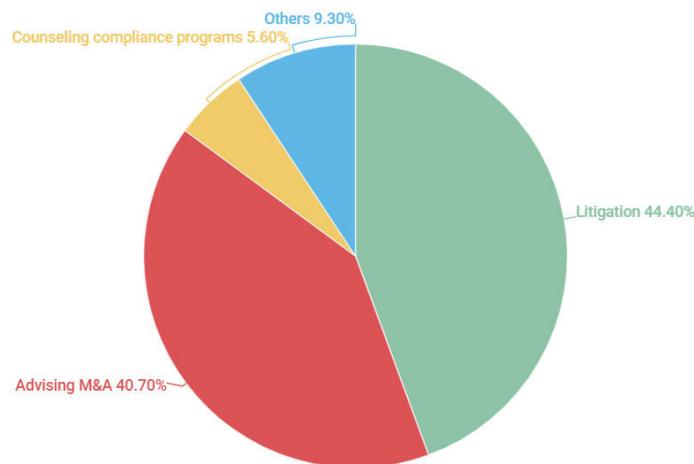
**Figure 3a and 3b: Sectors in which surveyed lawyers have worked**



Furthermore, litigation and advising in mergers and acquisitions<sup>13</sup> are the most representative part of their antitrust practice (representing 85% of the respondents). Litigation is most representative in Chile, Colombia, Mexico, and Peru, while advising in mergers and acquisitions is more frequent in Argentina, Brazil, and Ecuador.

In contrast, only 3 out of 54 (5.6%) individuals declared that the most representative part of their career has been counseling companies on compliance programs, as seen in Figure 3c. Specifically, attorneys who answered that the major part of their antitrust practice is counseling on compliance programs are from Brazil, Colombia, and Peru.

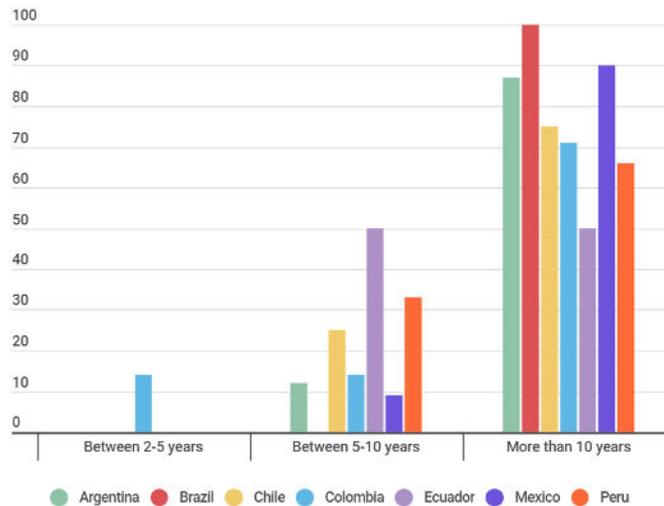
**Figure 3c: Most representative of their antitrust practice**



13 Question 4 from the Questionnaire. “4. Which category is most representative of the major part of your antitrust practice? (Please choose one): a. Litigation, b. Advising on mergers and acquisitions, c. Counseling on compliance programs, d. Other: \_\_\_\_\_”.

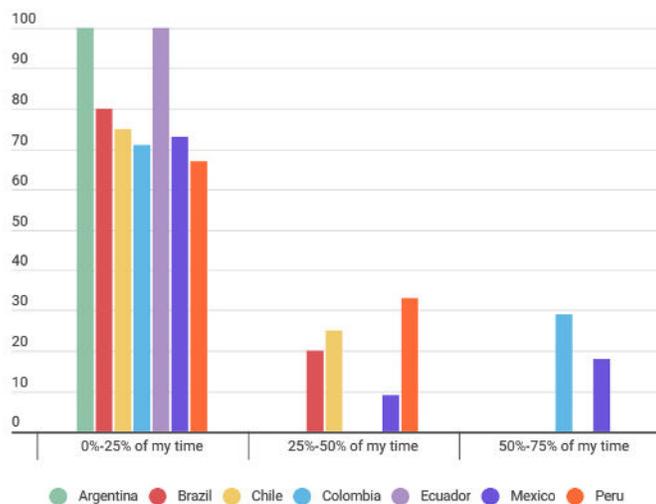
Regarding their experience on advising companies on compliance programs,<sup>14</sup> 81.5% of the respondents declared having more than 10 years of experience and 16.7% having between 5 and 10 years of experience. As seen in Figure 4, more than 80% of attorneys from Argentina, Brazil, and Mexico have more than 10 years of experience in this practice area.

**Figure 4: Years of experience counseling companies on antitrust compliance programs**



Furthermore, when asked about how much time they use, as private attorneys, to develop antitrust compliance programs for their clients,<sup>15</sup> most of them (79.6%) states using between 0 and 25% of their time to this practice area, as seen in Figure 5. Noteworthy, none of the lawyers work full-time developing compliance programs, as no respondent answered that they dedicate between 75% and 100% of their time developing antitrust compliance programs.

**Figure 5: Time used to develop antitrust compliance programs for their clients**

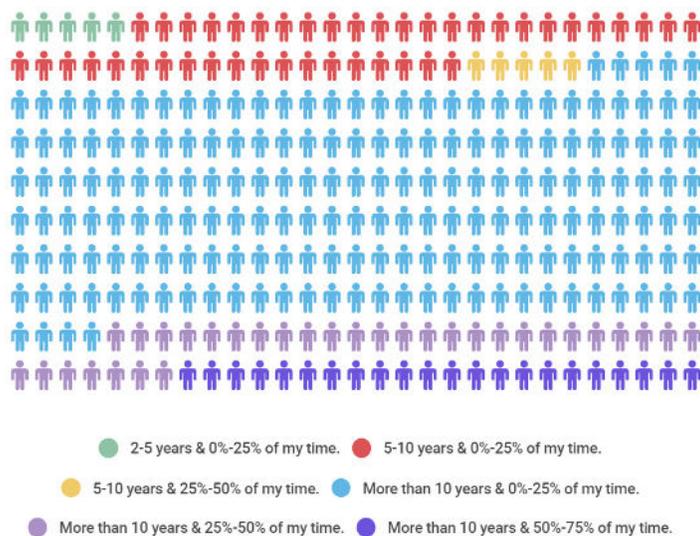


14 Question 5 from the Questionnaire. “5. How many years of experience do you have in counseling companies on compliance programs? (Please choose one): a. Less than 2 years of experience, b. Between 2-5 years of experience, c. Between 5-10 years of experience, d. More than 10 years of experience, e. N/A”.

15 Question 6 from the Questionnaire. “6. How much time do you use, as a private attorney, to develop antitrust compliance programs for your clients? (Please choose one): a. 0%-25% of my time, b. 25%-50% of my time, c. 50%-75% of my time, d. 75%-100% of my time, e. N/A”.

However, a difference can be seen when distinguishing according to the number of years on counseling companies in compliance programs, as Figure 6 shows. Moreover, in Chile, Colombia, and Mexico, attorneys with more years of experience dedicate more time developing antitrust compliance programs.<sup>16</sup> Interestingly, in these countries, those who use more than 25% of their time have more than 10 years of experience.

**Figure 6: Time developing antitrust compliance programs according to years of experience**

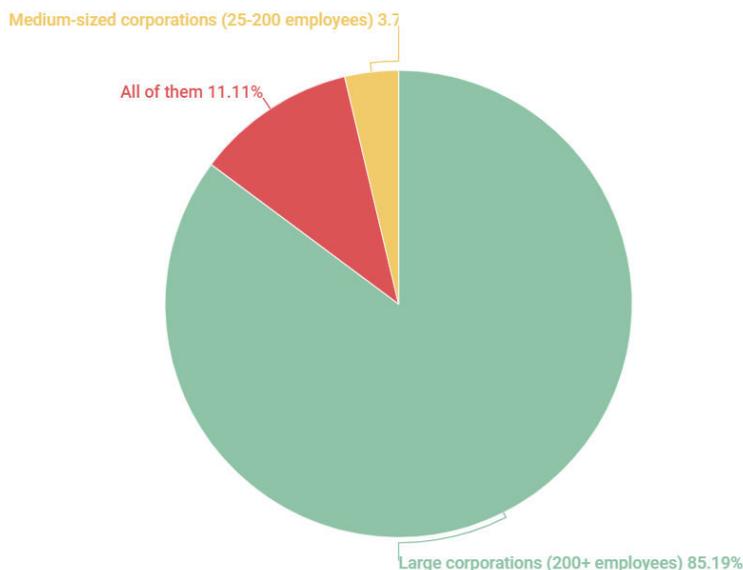


In summary, most of the attorneys that answered the questionnaire are between 45 and 55 years old, and litigation and advising in mergers and acquisitions represent most of their career. Developing antitrust compliance programs for their clients represents less than a fourth of the time they use, even though most of them have more than ten years of experience in the matter.

As for the size of companies they typically advise,<sup>17</sup> most of the surveyed lawyers (85.2%) indicate advising large corporations, with more than 200 employees. Only 6 out of 54 (11.1%) advise all sizes and types of corporations (including government), as Figure 7 shows.

16 In Argentina and Ecuador, all attorneys declare using between 0% and 25% of their time to develop antitrust compliance programs, so no difference can be seen. In Brazil, no difference is seen, as 100% of the surveyed attorneys indicate having more than 10 years of experience. In Peru, 75% of attorneys with more than ten years of experience use between 0% and 25% of their time developing antitrust compliance programs.

17 Question 7 from the Questionnaire. “7. What is the size of the companies you typically advise? (Please choose one): a. Large corporations (more than 200 employees), b. Medium-sized corporations (between 25 and 200 employees), c. Small corporations (less than 25 employees), d. All of them, e. Other, including government”.

**Figure 7: Size of companies typically advised by attorneys in antitrust matters**

## ■ V. COMPLIANCE PROGRAMS REGULATION AND RECOGNITION

On June, 2021, the Organization for Economic Co-operation and Development (OECD) released a background material on competition compliance programs for the virtual meeting of the Competition Committee’s Working Party<sup>18</sup> The OECD describes several ways by which agencies and authorities regulate and incentivize the implementation of compliance programs. In that vein, “Some agencies don’t grant credit, and others that do have different conditions attached to it, or pursue different policies with regard to pre-existing programmes or programmes introduced following an offence”.<sup>19</sup> As authors have pointed out, recognition by antitrust authorities of effective compliance programs could be a powerful motivator for companies to implement them.<sup>20</sup>

### V.1 Antitrust regulation and judicial precedents on compliance programs

In this section, respondents were questioned<sup>21</sup> about legislative and administrative regulation of compliance programs in their jurisdiction. Most of them (33 out of 54) stated that, in their jurisdictions, there are guidelines from antitrust authorities that regulate the recognition and content of antitrust compliance programs. Nonetheless, 14 out of 54 (26%) sustained that there are no norms, judicial precedents, or official guidelines of antitrust authorities that regulate the recognition and content of antitrust compliance programs in their jurisdiction, as Figure 8 shows.

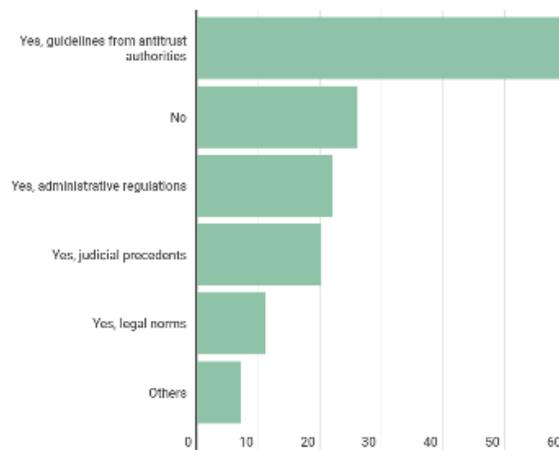
18 OECD, *OECD Competition Committee Discussion Paper*, Competition Compliance Programmes (June 2021), <http://oe.cd/ccp>

19 OECD, *OECD Competition Committee Discussion Paper*, Competition Compliance Programmes, 12 (June 2021), <http://oe.cd/ccp>.

20 Murphy & Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61 (2012).

21 Question 12 from the Questionnaire. “12. Are there any norms, judicial precedents or official guidelines of antitrust authorities that regulate the recognition and content of antitrust compliance programs in your jurisdiction? (You can choose more than one option): a. No, b. Yes, legal norms, c. Yes, administrative regulations, d. Yes, guidelines from antitrust authorities, e. Yes, judicial precedents, f. Yes, other \_\_\_\_\_”.

**Figure 8: Existence of regulation about the content of recognition of antitrust compliance programs, shown as a percentage of total respondents (%).**

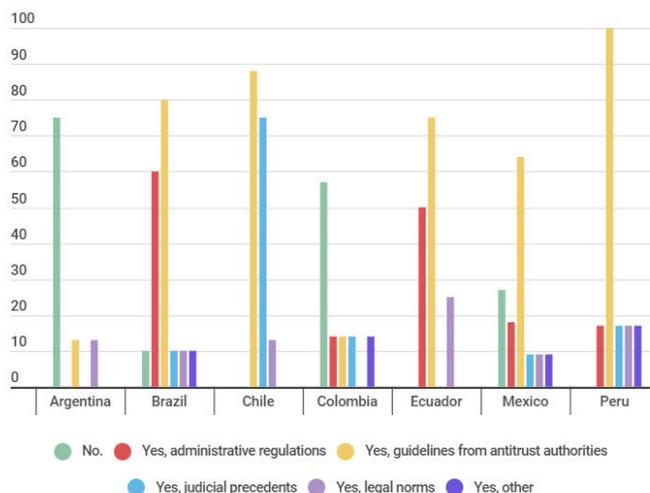


In Chile, Ecuador, and Peru, all of the attorneys affirmed that there are norms, judicial precedents, or official guidelines that regulate the recognition and content of antitrust compliance programs in their jurisdiction. Even when they differ on the source of the regulation, most of them coincide that there are guidelines from antitrust authorities that regulate compliance programs.

In Brazil, 90% of the lawyers stated that there are administrative regulations, guidelines from antitrust authorities and/or legal norms. In Mexico, the ratio drops to 73% (eight out of eleven), and regulation comes mainly from guidelines of antitrust authorities

In Colombia and Argentina, more than half of the lawyers stated that there are no norms, judicial precedents, or official guidelines that regulate compliance programs. In Argentina, six lawyers (75%) answered that there is no regulation, one that there are legal norms, and another that there are guidelines from antitrust authorities. Meanwhile, in Colombia, four out of seven (57%) answered that there is no regulation, as Figure 9 shows.

**Figure 9: Regulation of antitrust compliance programs by country<sup>22</sup>**



22 The option Yes, other represents different answers by country. In Brazil “antitrust authority’s precedents”, in Colombia “[i]n Colombia there is a technical norm issued by ICONTEC, the institute of technical norms”, in Mexico “[recommendation]” and in Peru “[s]pecific decisions of the antitrust authority sanctioning illegal conducts”.

### Box No. 1: Interviews results – Regulation and recognition of compliance programs

As can be seen, the results of the survey show the existence of different sources of regulation of antitrust compliance in each of the countries. Contradictory results can be observed in the cases of Argentina, Colombia and Mexico, since some respondents even indicated that there would be no specific regulation on this matter. Here we summarize the explanations that some practitioners and the authorities of each of the countries gave us in the interviews, and that could shed light on the variety of responses.

According to the information recollected through the interviews of authorities and practitioners, Brazil,<sup>23</sup> Ecuador,<sup>24-25</sup> Chile,<sup>26</sup> and Peru<sup>27</sup> have specific guidelines issued by antitrust authorities dedicated exclusively to granting orientation on antitrust compliance.

The authorities of Brazil and Chile also indicated that their compliance guidelines are complemented by other guidelines. In the case of Brazil, the CADE's<sup>28</sup> representative stated that the 2016 compliance guideline is complemented by CADE's guidelines on leniency and on cease-and-desist agreements.<sup>29</sup> In the case of Chile, the FNE's representative stated that their Trade Associations Guidelines<sup>30</sup> gives substantive content to its 2012 Compliance Guidelines.<sup>31</sup>

In the case of Colombia, although they do not have guidelines with these specific characteristics, at the end of 2020, the Colombian antitrust authority (SIC) promoted the issuance of a technical standard<sup>32</sup> along with the Colombian Institute of Technical Standards and Certification

23 CADE, *Guidelines for Competition Compliance Programs* (2016), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf>.

24 Notably, one practitioner from Ecuador told us that it is common for companies' legal advisors to use the guidelines contained in ISO No. 37301 standards on Compliance Management Systems, and ISO No. 37001 standards on Anti-Bribery Management System as references when designing antitrust compliance programs.

25 SMPC, *Competition Compliance Guideline* (2021), <https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/09/Guia-Compliance-en-Competencia-SCPM-INAC-DNPC-002-.pdf>

26 Fiscalía Nacional Económica, *Compliance Programs Guidelines* (2012), <https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>

27 INDECOPI, *Guideline of Compliance Programs for Free Competition Regulations* (2021), <https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115530-guia-de-programas-de-cumplimiento-de-las-normas-de-libre-competencia>

28 Conselho Administrativo de Defesa Econômica

29 CADE, *Guidelines for Cease and Desist Agreements for Cartel Cases* (2016), [https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines\\_tcc1.pdf](https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines_tcc1.pdf)

30 Fiscalía Nacional Económica, *Trade Associations and Free Competition Guidelines* (2011), [https://www.fne.gob.cl/wp-content/uploads/2011/08/guia\\_asociaciones\\_gremiales.pdf](https://www.fne.gob.cl/wp-content/uploads/2011/08/guia_asociaciones_gremiales.pdf)

31 The FNE representative also highlighted that the FNE's Internal Guidelines for Fine Requests explicitly consider compliance as a factor that the agency could take into account when requesting the application of fines before the TDLC. FNE, *Internal Guidelines for Fine Requests* (2019) <https://www.fne.gob.cl/wp-content/uploads/2019/08/Gu%C3%ADa-de-multas.pdf>

32 ICONTEC, *National Technical Standard for the establishment of best practices on the compliance of Colombian competition laws and policies (NTC 6378:2020)* (2020), <https://tienda.icontec.org/gp-requisitos-para-el-establecimiento-de-buenas-practicas-de-proteccion-para-la-libre-competencia-ntc6378-2020.html>

(ICONTEC),<sup>33</sup> which contains minimum requirements for the establishment of best practices on compliance with antitrust laws and policies, available to be adopted voluntarily by any market agent.<sup>34</sup> According to the SIC, economic agents in Colombia can apply to certificate their antitrust compliance programs directly by INCOTEC, while the SIC can provide support to companies to guide them in complying with the requirements contained in the technical standard.

In the case of Mexico, in the interviews, the practitioner from that country indicated that although there are no specific guidelines exclusively on antitrust compliance, there have been advocacy efforts by COFECE, which materialized in the guideline “Recommendations to Comply with the Federal Law of Economic Competition”.<sup>35</sup> In fact, this document contains a specific section (Section 2) with recommendations for designing and implementing an effective compliance program. Accordingly, the COFECE’s representative referred to this guideline as one of the main tools that companies in Mexico use to develop compliance programs, as it provides recommendations to comply with antitrust regulations and generate a culture of competition within organizations.

On the other hand, Argentina<sup>36-37</sup> does not have any guidelines intended to provide guidance on antitrust compliance.

As of legal references, the only explicit mention to antitrust compliance in legislative norms is from the Peruvian Competition Law. Article 49 of this law contemplates compliance as one of the corrective measures that INDECOPI can impose when sanctioning anti-competitive conducts.<sup>38</sup>

### **Box No. 2: Interviews results – Existence of precedents regarding antitrust compliance**

In relation to the existence of judicial precedents, the authorities and attorneys from Argentina, Brazil, Ecuador, Colombia and Mexico indicated that there would be no specific precedents regarding antitrust compliance. In contrast, in Chile there are several judicial precedents in which the Competition Court (TDLC) and the Supreme Court have imposed the implementation of compliance programs as corrective measures along with the sanctions derived from the anti-com-

33 ICONTEC, a non-governmental entity, holds a strategic role promoting, developing, and guiding the application of Colombian Technical Standards and other normative documents intended for achieving an optimal economy, improving quality, and facilitating customer-supplier relationships at the corporate, national, or international level. OECD, *Note by Colombia, Working Party No. 3 on Co-operation and Enforcement of the OECD, Competition Compliance Programmes* (May 2021), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)7/en/pdf).

34 OECD, *Competition Compliance Programmes – Note by Colombia, Working Party No. 3 on Co-operation and Enforcement of the OECD*.

35 COFECE, *Recommendations to Comply with the Federal Law of Economic Competition* (2019), <https://www.cofece.mx/recomendaciones-para-cumplir-con-la-lfce/>. This guideline has had two versions: one from 2015 and another from 2019.

36 In fact, the representative of the Argentine agency indicated that they are currently in the process of obtaining financing to develop a guideline on antitrust compliance.

37 According to the practitioner from Argentina, there would only be a limited reference in footnote 17 of the CNDC’s “*Guideline on Defense of Competition for Business Associations and Chambers and Professional Colleges and Associations*” on the need to implement compliance programs. CNDC, *Guideline on Defense of Competition for Business Associations and Chambers and Professional Colleges and Associations*, 13 (2018), [https://www.argentina.gob.ar/sites/default/files/guia\\_camaras\\_y\\_asociaciones\\_empresariales\\_10-12-2018\\_0.pdf](https://www.argentina.gob.ar/sites/default/files/guia_camaras_y_asociaciones_empresariales_10-12-2018_0.pdf).

38 OECD, *Note by Peru, Working Party No. 3 on Co-operation and Enforcement of the OECD, Competition Compliance Programmes* (May 2021), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)22/en/pdf).

petitive conduct.<sup>39</sup> Also there is a recent relevant judicial precedent that analyzed the possibility that a pre-existing compliance program could act as a liability mitigation or exemption, in which the Chilean Supreme Court determined that for a compliance program to be considered effective to enable a liability mitigation, it has to prevent the anti-competitive conduct (“The Supermarkets Cartel”).<sup>40</sup> Also, Peru’s authority commented one judicial precedent where the INDECOPI’s Court discussed some of the characteristics that a compliance officer should have.<sup>41</sup>

However, authorities and practitioners from Argentina, Brazil, Ecuador, Colombia, and Peru highlighted the existence of administrative precedents in which the antitrust authority has accepted the implementation of a compliance program as a condition for a settlement agreement, for closing an investigation or approving a merger. Also, in Ecuador, Peru, and Chile<sup>42</sup> there are administrative precedents in which the antitrust authority has imposed the implementation of compliance programs as corrective measures, along with the sanction of anti-competitive conducts.

## V.2. Benefits antitrust agencies could grant in relation to compliance programs

Experiences vary between jurisdictions when asked about the current position of the antitrust authorities when dealing with compliance programs, as seen in Figure 10. All in all, in attorneys’ view, most competition authorities recognize pre-existing compliance programs and could provide some benefits/incentives to companies, or offer no benefit, but provide guidance on the content that a compliance program should have.<sup>43</sup>

39 This difference with respect to other Latin American countries can be explained by the particular design of the Chilean antitrust institutions. This is structured around the activity of the FNE -which is the administrative body in charge of investigating and prosecuting anticompetitive infringements -, and the TDLC -which is a specialized competition court that decides specific cases and applies sanctions for anticompetitive conducts based on claims filed by the FNE or private parties. In turn, the decisions of the TDLC can be reviewed directly by the Supreme Court, through a wide-ranging appeal recourse.

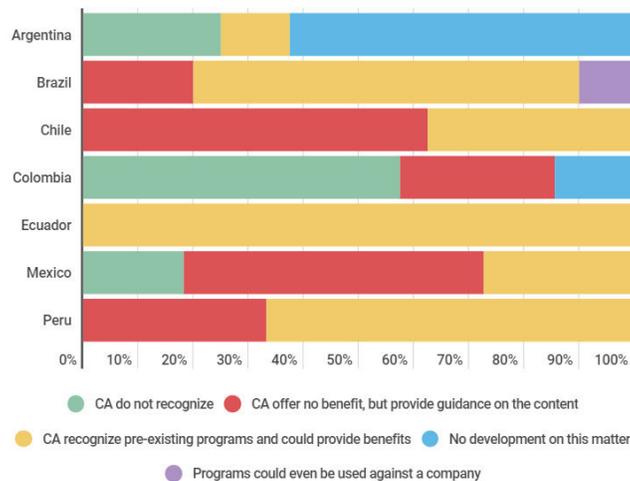
40 In a procedure that ended up with the sanction of three supermarkets for having participated in a hub-and-spoke cartel, in 2019 the TDLC accepted a pre-existing compliance program as a mitigating factor of the anticompetitive conduct with a fine reduction. However, in 2020, the Chilean Supreme Court doubled the fines imposed by the TDLC, and also rebuked the defendants’ claims to reduce the fines because of the existence of pre-existing compliance programs. The Supreme Court stated that for a compliance program to be effective, it must prevent conduct such as the hub-and-spoke cartel, and the proven four-year violation clearly demonstrated that the programs were not effective. See <https://centrocompetencia.com/caso-supermercados-hub-and-spoke-y-programas-de-cumplimiento/> (in Spanish only).

41 See decision of the INDECOPI Competition Commission, Res. 014-2020/CLC-INDECOPI, and resolution of the INDECOPI Tribunal that confirmed the Commission’s decision, Res. 0037-2021/SDC-INDECOPI (on the incompatibility of the functions of a legal manager of a company with the functions of a compliance officer), available at: [https://servicio.indecopi.gob.pe/buscadorResoluciones/tribunal\\_sala\\_def\\_comp.seam](https://servicio.indecopi.gob.pe/buscadorResoluciones/tribunal_sala_def_comp.seam)

42 For example, see [TDLC Judgment No. 167/2019](#) (Supermarkets Cartel), [TDLC Judgment No. 171/2019](#) (Shipping Companies Cartel), [TDLC Judgment No. 172/2020](#) (Blister Cartel), [TDLC Judgment No. 179/2022](#) (Fire Cartel).

43 Question 13 from the Questionnaire. “13. What is the current position of the antitrust authorities of your country when dealing with compliance programs, based on their most recent pronouncements?: a. Authorities recognize pre-existing compliance programs and could provide some benefits/incentives to companies, b. Authorities recognize compliance programs only introduced after a violation has occurred, c. Authorities offer no benefit, but provide guidance on the content that a compliance program should have, d. Authorities do not recognize or credit antitrust compliance programs, e. Compliance programs could even be used against a company, f. There is no development on this matter”.

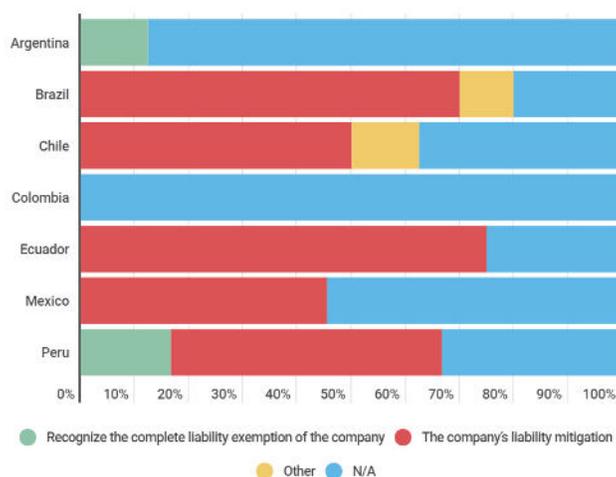
**Figure 10: Position of antitrust authorities when dealing with compliance programs**



Noteworthy, even when most attorneys from Brazil, Chile, Mexico, and Peru assert that there are guidelines from antitrust authorities that regulate the content of antitrust compliance programs, there is no clear consensus on the position of the authority when dealing with the program. Only in Ecuador, the attorneys unanimously state that they recognize pre-existing programs and could offer some benefits or incentives.

Excluding those answers where attorneys considered that incentives granted to companies are not applicable to their jurisdiction (thus, only if compliance programs are recognized in their countries), in respondents’ experience, the main benefit<sup>44</sup> companies might receive from applying them is the company’s liability mitigation by agreeing to defer prosecution, pursuing lesser charges, or reducing fines, followed, to a much lesser extent, by recognizing the complete liability exemption of the company, as seen in Figure 11.

**Figure 11: Incentives granted to companies by country<sup>45</sup>**



44 Question 14 from the Questionnaire. “14. In case compliance programs are recognized in your country, which of the following benefits or incentives could the antitrust authority grant to companies that apply them? (You can choose more than one): a. The company’s liability mitigation (by agreeing to defer prosecution, pursuing lesser charges, or reducing fines), b. Recognize the complete liability exemption of the company, c. Other benefits, such as preferences in bidding on government contracts, d. Other (please specify): \_\_\_\_\_, e. N/A”.

45 Based on the answers obtained in our interviews, the option “Other” represents in Brazil “[i]n theory, liability mitigation. In practice, to the best of my knowledge this has never been applied.” In Chile “[t]he precedents are unclear. While the TDLC indicated that a company can be granted a liability mitigation (and even an exemption of liability), the Supreme Court imposed such burdensome requirements that in practice no incentives exist”. Finally, in Ecuador was noted that liability mitigation was the answer but with “[o]ther benefits, such as preferences in bidding on government contracts”.

### Box No. 3: Interviews results – Possible benefits antitrust agencies could grant regarding the implementation of compliance programs.

As can be seen in Figure 10, except for Ecuador, practitioners from the countries under study tend to show disagreement in relation to whether the antitrust authorities could provide incentives or benefits to companies that implement compliance and what types of benefits could be granted.

In what follows, we summarize the impressions that practitioners and the authorities have given in relation to these results, and that could explain the different answers obtained in the survey.

**Argentina.** The Argentine practitioner pointed out that in the country no benefits have been granted to companies for the implementation of ex ante antitrust compliance program.<sup>46</sup> Accordingly, the authority confirmed that to date the agency has not granted benefits for the implementation of a pre-existing compliance program, but that there is a legal possibility of doing so in the future based on the rules for grading fines contained in article 56 of the Argentine antitrust law.

**Brazil.** The practitioner from Brazil indicated that in practice there is no clarity on CADE's policy in relation to granting benefits to companies that implement pre-existing compliance programs.<sup>47</sup> However, the authority stated that the agency currently considers antitrust compliance in two scenarios. First, insofar as it can enable a company to apply for leniency or a cease-and-desist agreement. Secondly, CADE has granted fine reductions to companies that commit to adopting a compliance program in the future, to the extent that it will be monitored by the agency and follows the requirements of CADE's Guideline on Compliance. The authority added that until now it has not granted reductions in sanctions to companies that have showed the existence of a compliance program before committing the infraction.<sup>48</sup>

**Ecuador.** The Ecuadorian practitioner explained that the possibility of the SMPC<sup>49</sup> granting benefits to companies that implement ex ante compliance programs is indicated in the 2021 guidelines on antitrust compliance. However, to date there would be no cases in which the existence of a pre-existing compliance program has been considered as a liability mitigation by the authority.<sup>50</sup> The authority confirmed this information and stated that a compliance program could even be

46 Although the practitioner mentioned the existence of some cases in which the Argentine authority has accepted compliance as a commitment to approve a merger, these would be few cases and of little relevance. See, for example, CNDC's Decision No. 835 of October, 2010, on merger between PIRELLI & C S.P.A. and others, File S01:0014652/2009, which established the need for the parties to the merger to undergo a training on free competition regulation conducted by the CNDC. See also CNDC Decision No. 2018-363 of June 2018 on the acquisition of a pasta business unit from MONDELEZ ARGENTINA S.A. and INTERCONTINENTAL BRANDS LLC on behalf of MOLINOS RIO DE LA PLATA S.A. and MOLINOS IP, File S01:0231837/2014, which recommended that the acquiring parties intensify the specialization in competition of their Compliance Management and that their compliance area train directors, executives and commercial managers on proper competitive action in the dry pasta market.

47 However, the practitioner pointed out that CADE has accepted the implementation of compliance programs as elements to reach a settlement with the authority.

48 However, the authority also indicated that according to the compliance guidelines and the regulation of fine reduction factors in the competition law, it would be legally possible to grant this type of benefit. In this regard, see section 3.3.4 of CADE's Compliance Guideline.

49 Superintendencia de Control de Poder de Mercado.

50 In fact, the practitioner asserted that there would be one case in which a mitigation was requested based on the existence of a compliance program, but the authority rejected it since the program would not have contributed to the timely detection of anticompetitive conduct. According to the practitioner and the Ecuadorian authority, the public resolution of this case would not yet be available.

used as an aggravating factor against a company.<sup>51</sup>

**Chile.** According to the practitioner from Chile, the decision of the Chilean Supreme Court in the abovementioned “Supermarkets Case” would have established a negative and unclear position regarding a possible mitigation benefit that companies that have implemented a pre-existing compliance program could receive from antitrust authorities.<sup>52</sup> On the other hand, the authority stated that, from their perspective, compliance can never act as an exemption from companies’ liability, but it is possible that it could justify a reduction of the sanction requested by the FNE before the TDLC,<sup>53</sup> only to the extent that it is proven that a serious, real and effective compliance program was applied.

**Colombia.** The practitioner from Colombia mentioned that the authority accepts the implementation of a compliance program by a company as one of the commitments (garantías) for closing an investigation. Furthermore, legally the SIC could also mitigate fines for companies that have implemented a pre-existing program. In fact, the SIC’s representative confirmed this information and added that in some cases they have already opened the possibility that a commitment to adopt a compliance program in the future, offered by a company at the beginning of an investigation, may be considered by the authority for granting a reduction of the fine.

**Mexico.** The practitioner from Mexico indicated that the only benefit companies obtain by implementing compliance programs is the possibility of preventing anti-competitive conduct. The practitioner also pointed out that it would be a great incentive for companies if COFECE establishes specific mitigation benefits for ex ante compliance programs. Accordingly, the COFECE representative explained that there is no policy of the authority in relation to possible benefits that could be granted to companies that implement compliance programs in an infringement scenario, and that it is not explicitly regulated. However, the authority indicated that compliance could legally be taken into account to reduce a sanction, based on art. 182 of the Mexican competition law regarding the graduation of fines, although this would have to be analyzed on a case-by-case basis.<sup>54</sup>

**Peru.** The practitioner from Peru pointed out that the INDECOPI’s Guidelines issued in 2020 clearly states that there is the possibility of receiving a fine mitigation in case of having a pre-existing compliance program. However, according to the practitioner, the requirements established by INDECOPI for this benefit would be very difficult to achieve in practice. Likewise, the INDECOPI’s representative indicated that the agency’s Compliance Guideline explicitly recognizes the possibility of mitigating the fines by 5 to 10%, to whoever has a compliance program prior to the commission of the infraction and that complies with certain requirements.<sup>55</sup>

51 In fact, this possibility is expressly stated on page 10 of the SMPC’s compliance guideline. See SMPC, Competition Compliance Guideline, 10.

52 According to the practitioner, having the Supreme Court indicated that the only way in which compliance can mitigate responsibility is if the conduct did not occur, it established a “high and almost unattainable standard.”

53 In fact, the FNE’s Compliance Guideline expressly states that “a possible benefit associated with the implementation of a Compliance Program is its consideration in the event that lawsuit is filed before the TDLC, both in relation to the determination of the fine, as well as any other sanction to be requested (...)”. Fiscalía Nacional Económica, Compliance Programs Guidelines, 18.

54 However, the authority also pointed out that it is not usual for companies to present arguments based on the existence of a compliance program to obtain the mitigation of sanctions, and that there have also been no cases in which this type of benefit has actually been granted by the agency.

55 INDECOPI, *Guideline of Compliance Programs for Free Competition Regulations*, Section 7.3.

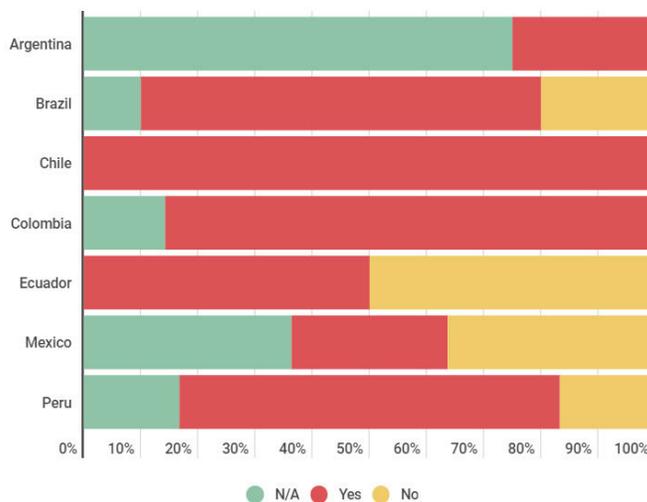
**Box No. 4: Interviews results – Compliance and Enforcement**

When asked about the incentives that antitrust authorities currently provide for companies that implement compliance programs, some practitioners also pointed out the relevance of the enforcement of antitrust law as a natural incentive for the development of antitrust compliance.

For example, the Argentinian practitioner referred to the low activity of the antitrust authority in prosecuting and imposing sanctions for anticompetitive conducts as a substantive issue behind the lack of incentives to implement antitrust compliance. In Brazil, the practitioner commented that the culture of compliance in the country would currently be affected by a decrease in the enforcement activity of the antitrust authority in recent years, especially due to the diminished use of the leniency tool. Finally, the practitioner of Peru mentioned that there has indeed been an increase in the use of antitrust compliance in recent years, and that this could be explained not so much by the publication of guidelines on this topic, but mainly because of the increase of INDECOPI’s antitrust enforcement, especially regarding cartel cases.

As Figure 12 suggests, most lawyers (59.3%) agreed that in their jurisdiction the lack of early detection and reporting of anti-competitive behavior to authorities could be considered as evidence of the ineffectiveness of a compliance program.<sup>56</sup>

**Figure 12: Lack of early detection and reporting of anticompetitive behavior could be considered as evidence of the ineffectiveness of a compliance program**



For instance, according to the experience of most of the respondents of Brazil, Chile, Colombia, and Peru, even when authorities provide incentives to companies that implement compliance programs, such as liability mitigation, they can be considered inefficient if they do not allow timely detection of anti-competitive conducts, acting as a counterweight to such benefit.

<sup>56</sup> Question 15 from the Questionnaire. “15. Based on previous decisions or guidelines of the antitrust authorities of your country, could the lack of early detection and reporting of anticompetitive behavior before authorities be considered as evidence of the ineffectiveness of a compliance program? (Please choose one): a. Yes, b. No, c. N/A”.

### Box No. 5: Interviews results – Consequences of lack of early detection and reporting of anti-competitive behavior

Discordant responses can be seen from lawyers from Brazil, Ecuador, Mexico and Peru in relation to whether the antitrust authority could indeed consider a pre-existing compliance program ineffective and not grant a benefit (such as the reduction of the fine) to a company, if the program failed to detect the anticompetitive conduct.

During the interviews, the practitioner from Brazil explained that when CADE finds an ineffective compliance program, it usually recommends improving the existing program.

In the case of Ecuador, the practitioner confirmed that there would be one case in which a mitigation was requested based on the existence of a compliance program, but the authority rejected it since the program would not have contributed to the timely detection of anticompetitive conduct. However, according to the practitioner and the Ecuadorian authority, the public resolution of this case would not yet be available.

The practitioner from Mexico commented that this matter is still not settled in the country.

Finally, in the case of Peru, Section 7.3 of the INDECOPI's compliance guidelines expressly states that in order to access a fine reduction, the company must have carried out the corresponding internal investigations promptly and seriously, adopting reasonable measures to stop the infraction in a timely manner, and that *“once the offending conduct is discovered thanks to its Compliance Program, the company must report it to INDECOPI promptly, and before the authority has carried out investigative actions that have been brought to its attention, in particular to request benefits under the leniency program”*.<sup>57</sup>

### V.3. Attorney-client privilege protection of antitrust compliance reports

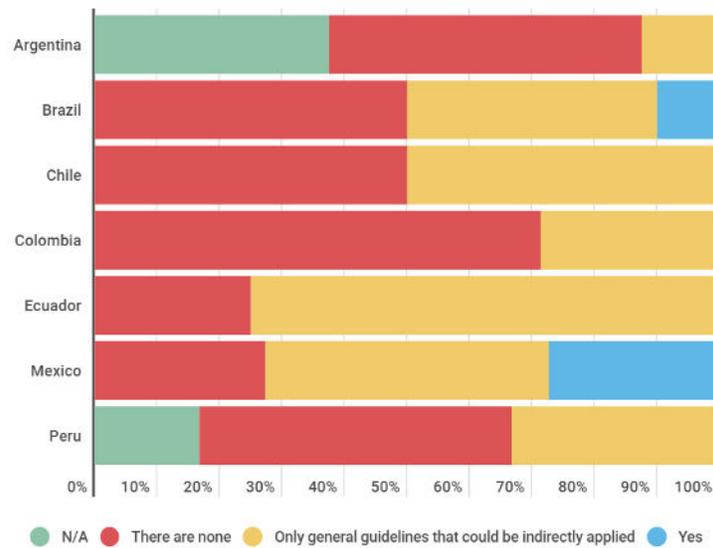
Confidentiality and attorney-client privilege encourages clients to disclose all the information needed from attorneys to properly advise and represent them. Nonetheless, 46.3% of the respondents' state that there are no guidelines or precedents that recognize the attorney-client privilege on the content of antitrust compliance programs in their countries. On the other hand, 38.9% of the respondents affirms that there are only general guidelines that could be indirectly applied to antitrust compliance programs in this matter. Only 7.4% affirm that the attorney-client privilege applies to antitrust compliance programs.

As Figure 13 shows, in Argentina, Brazil, Chile, Colombia, and Peru, there is no explicit recognition of attorney client privilege for compliance programs,<sup>58</sup> according to the experience of most of their attorneys interviewed. In Ecuador and Mexico, most lawyers believe there are only general guidelines that could be indirectly applied to antitrust compliance programs in this matter. A great minority of lawyers in Brazil (10%) and Mexico (27.3%) considers that privilege does exist in matters of antitrust compliance programs.

57 INDECOPI, *Guideline of Compliance Programs for Free Competition Regulations*, Section 7.3.

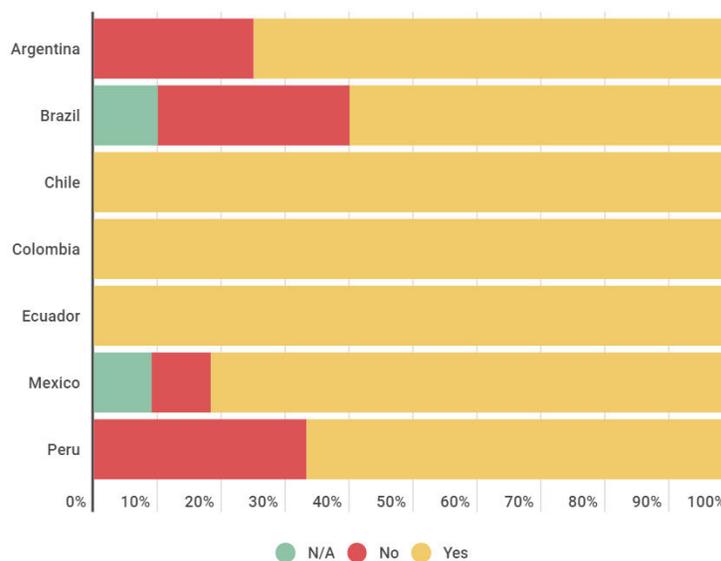
58 Question 23 from the Questionnaire. “23. Are there any guidelines or precedents from your country's antitrust authority that recognize the attorney-client privilege on antitrust compliance programs adopted by companies? a. There are none, b. There are only general guidelines that could be indirectly applied to antitrust compliance programs, c. Yes, d. N/A”.

**Figure 13: Recognition of attorney-client privilege on antitrust compliance programs**



Moreover, the vast majority (81.5%) of lawyers believe that recognizing attorney-client privilege on antitrust compliance programs could incentivize companies to apply more serious and effective programs,<sup>59</sup> which could improve the rate of adoption of compliance measures in Latin America. Attorneys from Argentina, Brazil, Peru, and to a lesser extent, Mexico, are more skeptical about the incentives of recognizing attorney-client privilege, as Figure 14 shows. On the contrary, experts from Chile, Colombia and Ecuador believe that the recognition of the privilege could have important benefits on the application of more serious and effective compliance programs.

**Figure 14: Recognizing attorney-client privilege could incentivize companies to apply more serious and effective programs**



59 Question 24 from the Questionnaire. “24. Do you think that recognizing attorney-client privilege on antitrust compliance programs could incentivize companies to apply more serious and effective programs? a. Yes, b. No, c. N/A”.

### Box No. 6: Interviews results – Compliance and Attorney-client privilege

As can be seen in Figure 13, in most countries there is no agreement regarding the existence of regulations or precedents that recognize the attorney-client privilege on the content of antitrust compliance programs.

Indeed, in the interviews, the practitioners and authorities from Argentina,<sup>60</sup> Brazil,<sup>61</sup> Ecuador,<sup>62</sup> Chile,<sup>63</sup> Colombia,<sup>64</sup> and Peru confirmed that although they have general normative that could be applied, in their countries there is no specific regulation or precedent that protects legal secrecy in antitrust matters, neither a regulation that especially protects the legal opinions and reports that attorneys could produce while implementing or monitoring an antitrust compliance program.

In the case of Mexico, both the practitioner and the authority mentioned a relevant judicial precedent that explicitly referred to the attorney-client privilege in antitrust matters, and that ended up ordering COFECE to create an internal procedure to deal with documents that could be subject to legal secrecy.<sup>65</sup> Accordingly, in 2019 COFECE issued normative provisions in this regard and created a special committee within the agency, which is specifically in charge of reviewing documents that could be subject to attorney-client privilege, separate from the case handlers.

It is worth noting that, although Peru does not have a precedent or specific regulation on this matter, the 2020 Compliance Guideline of INDECOPI explicitly state that certain information of the compliance officer or committee in the strict exercise of their functions could be subject to legal secrecy.<sup>66</sup>

Finally, in order to find out if it is common for agencies to access documents or memorandums prepared by attorneys as a result of compliance advice, we asked the authorities if they have requested compliance reports from companies being under investigation for an anticompetitive infringement. Notably, none of the authorities stated that they have requested a legal compliance report in the context of an investigation.

60 Both the practitioner and the Argentine authority indicated that there would be no specific regulation on legal secrecy in antitrust matters.

61 In the case of Brazil, both the practitioner and the representative of the authority stated that there are only general rules on attorney-client privilege from the Brazilian BAR, but that these would not be sufficiently clear as to the scope of this privilege. The authority added that the agency has an internal manual that establishes a procedure to deal with documents subject to legal privilege that could be found in a down raid, and that eventual conflicts on this matter are ultimately define by a general judge.

62 The Ecuadorian authority indicated that professional secrecy is protected by constitutional norms and the general norms of the organic code of the public function.

63 The representative of the Chilean authority indicated that there would be no specific regulation on legal secrecy in antitrust matters. However, it is worth mentioning a recent precedent of the TDLC, in which the Tribunal confirmed the FNE's thesis that the attorney-client privilege does not cover communications between executives and an internal lawyer of a company. See: <https://centrocompetencia.com/tdlc-secreto-profesional-abogados-internos/>

64 The Colombian authority indicated that they do not have a defined position in relation to this matter. However, the SIC do have an internal procedure in which, in the context of down raids, attorneys can claim that a searched document is covered by attorney-client privilege.

65 See Agreement No. CFCE-215-2019 by which the Plenary of COFECE issued the provisions for the qualification of information derived from legal advice provided by economic agents, available at: <https://www.cofece.mx/wp-content/uploads/2019/09/DOF-30septiembre2019-01.pdf>

66 INDECOPI, *Guideline of Compliance Programs for Free Competition Regulations*, 33.

## VI. CHARACTERISTICS AND LEVEL OF COMPLEXITY OF THE ANTITRUST COMPLIANCE PROGRAMS

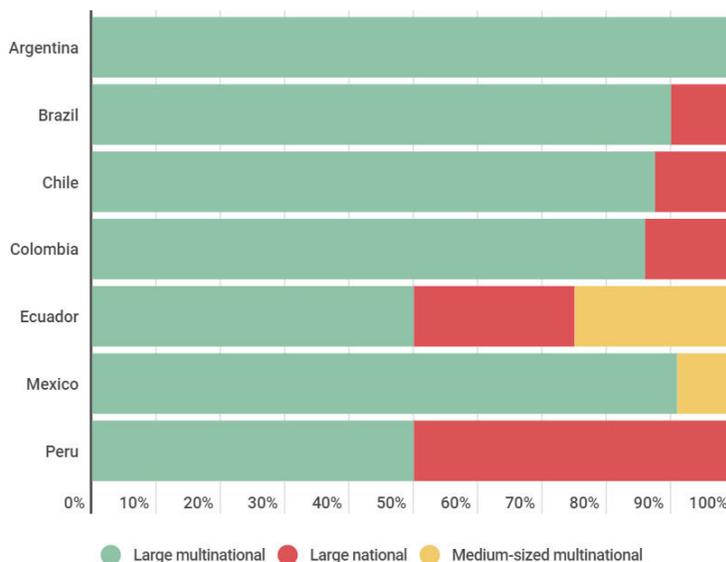
In this section we analyze which types of companies are interested in implementing compliance programs and why; what is the level of development of compliance programs in each country; what is the content that companies usually incorporate into compliance programs and the frequency with which they are reviewed; and whether the regulation and implementation of antitrust compliance programs abroad have any influence in the region.

### VI.1 Interest of companies on implementing antitrust compliance programs

Regarding the characteristic of companies that usually implement compliance programs, in respondents' experience, large multinational corporations<sup>67</sup> have a greater interest in applying antitrust compliance programs (83.3%), followed by large national corporations (13%), and in a much lesser extent, medium-sized corporations (3.7%). No respondent answered medium-sized national corporations nor small corporations.<sup>68</sup>

Furthermore, when disaggregating by country, some differences arise, as seen in Figure 15. The perception that the greatest interest in developing antitrust compliance programs comes from multinational companies predominates in all jurisdictions. Nonetheless, in the experience of attorneys from Peru, Ecuador and, to a lesser extent, of Colombia, Chile and Brazil, large national corporations also seem to show interest in implementing antitrust compliance programs.

**Figure 15: Greater interest in applying compliance programs by country**

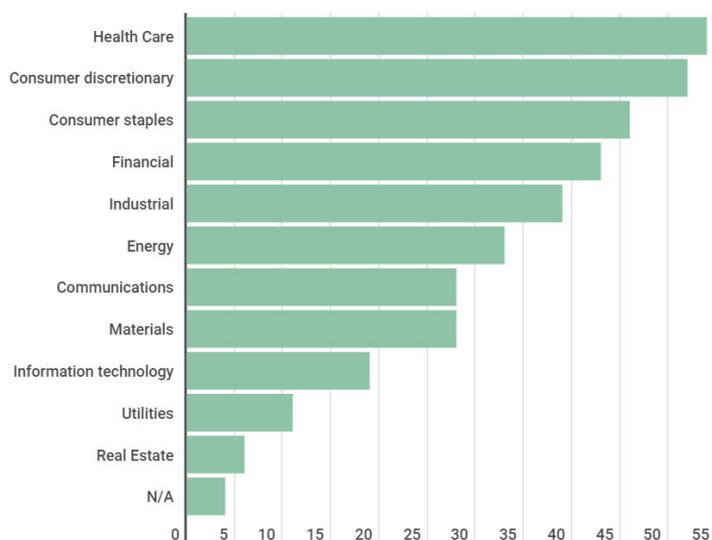


67 Question 8 from the Questionnaire. “8. In your experience, what is the size of the companies with greater interest in applying antitrust compliance programs? (Please choose one): a. Large multinational corporations (more than 200 employees), b. Large national corporations (more than 200 employees), c. Medium-sized multinational corporations (between 25 and 200 employees), d. Medium-sized national corporations (between 25 and 200 employees), e. Small corporations (less than 25 employees), f. N/A”.

68 Large corporations have more than 200 employees, medium corporations have between 25 and 200 employees, and small corporations have less than 25 employees.

When disaggregating by market,<sup>69</sup> attorneys indicate that companies of health care, consumer discretionary,<sup>70</sup> and consumer staples<sup>71</sup> industries present a major interest<sup>72</sup> in applying antitrust compliance programs. Figure 16 shows markets from the most to the least interested in this subject, according to attorneys' experience. Interestingly, when analyzing the main market by country, consumer discretionary leads in Argentina, Brazil, and Mexico, energy in Chile and Colombia, information technology in Ecuador, and consumer staples in Peru.

**Figure 16: Interest in applying antitrust compliance programs by market**



Regarding the reasons<sup>73</sup> that explain why companies implement compliance programs, about 44% of the respondents stated that, in their experience, companies' efforts in applying compliance programs originate as part of corporate group policies, 37% indicates that this interest originates when the industry to which the company belongs has been under the review of antitrust authorities, 7.4% states that the origin comes after the company has been sanctioned by the antitrust authorities, and 11.1% considers that the decision of applying antitrust compliance programs originates after a reform to the antitrust regulation has been implemented. Finally, in the respondents' experience, it is unusual for compliance programs to be implemented due to an obligation imposed by antitrust authorities.

69 According to the Global Industry Classification Standard (GICS), an international industry taxonomy.

70 Automobiles; consumer durables & apparel; retailing; etc.

71 Food & staples retailing; food, beverages & tobacco; household & personal products.

72 Question 9 from the Questionnaire. "9. In your experience, which markets present a major interest in applying antitrust compliance programs? (you can choose more than one): a. Communications (communication services; media & entertainment), b. Energy (Oil & Gas drilling, equipment and services, exploration, production, refining, storage; Coal & Consumable Fuels), c. Industrial (capital goods; commercial & professional services; transportation), d. Materials (chemicals; mining & metals; construction; paper & forest products; etc.), e. Consumer discretionary (automobiles; consumer durables & apparel; retailing; etc.), f. Consumer staples (food & staples retailing; food, beverages & tobacco; household & personal products), g. Health Care (equipment & services; pharmaceuticals, biotechnology & life sciences), h. Financial (banks; diversified financials; insurance), i. Information technology (software & services; technology hardware & equipment), j. Utilities (electric; gas; water; multi-utilities), k. Real Estate (Equity Real Estate Investment Trusts; Real Estate Management & Development), l. N/A".

73 Question 10 from the Questionnaire. "10. In your experience, antitrust compliance efforts implemented by companies of your country usually originate: (Please choose one): a. As part of the corporate group policies, not tied to a specific milestone, b. After the industry to which the companies belong has been under the review of the antitrust authorities, c. After the company has been sanctioned by the antitrust authorities, d. After a reform to the antitrust regulation has been implemented (for example, an increase in the penalties applicable to anti-competitive conducts), e. From an obligation imposed by the antitrust authorities, f. Other reasons: \_\_\_\_\_, g. N/A".

**Figure 17: Origin of the efforts on implementing compliance programs**

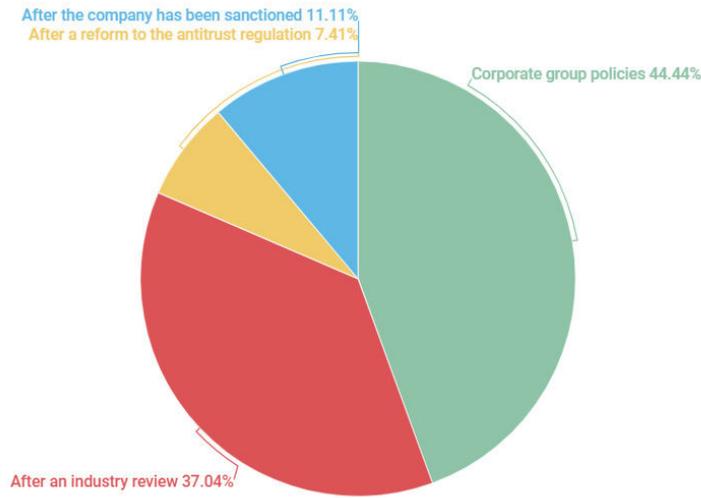
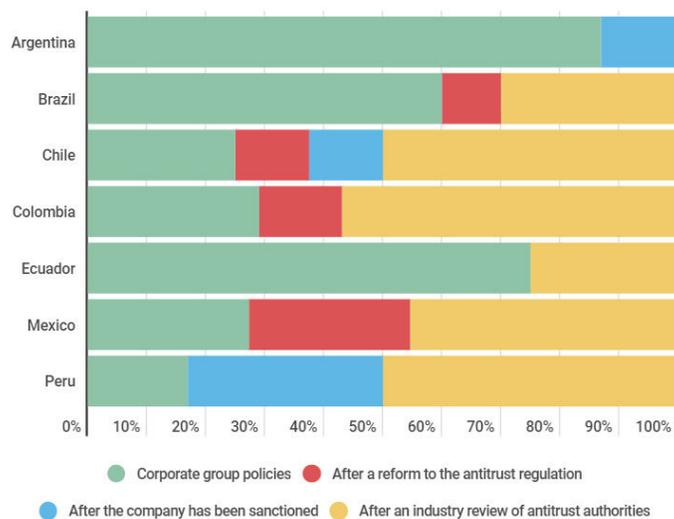


Figure 18 decomposes the answers by jurisdiction. In Argentina, Brazil, and Ecuador, respondents state that the efforts in applying antitrust compliance programs initiate mainly from corporate group policies. Also, in all countries, with the exception of Argentina, the attorneys pointed out that the fact that the industry to which the companies belong had been under the review of the antitrust authorities also triggers the companies’ interest in applying compliance programs, which it happens to be in greater proportion in Colombia, Peru, and Chile. In Mexico, and to a lesser extent, in Colombia, Chile and Brazil, attorneys indicate that compliance programs are also adopted after a reform to the antitrust regulation has taken place. Finally, only in Peru, and to a lesser extent, in Chile and Argentina, respondents state that compliance programs are also adopted after the company has been sanctioned by the antitrust authority.

**Figure 18: Origin of the efforts on implementing compliance programs by country**



## VI.2 Compliance programs as obligations or remedies

As it is said, an obligation from antitrust authorities can also be the reason for a company to decide to implement a compliance program or improve a pre-existing one.

As the OECD (2021) stated, compliance obligations can be part of leniency policies or consensual case resolution mechanisms, deferred prosecution agreements, plea agreements, settlement or commitment procedures. Jurisdictions may take different approaches in this regard.<sup>74</sup>

In this matter, 66.7% of the attorneys stated that, in their jurisdictions, they can identify cases in which the antitrust authority has required the implementation<sup>75</sup> of a compliance program to a company, as Figure 19 suggests.

**Figure 19: Antitrust authority has required the implementation of a compliance program**

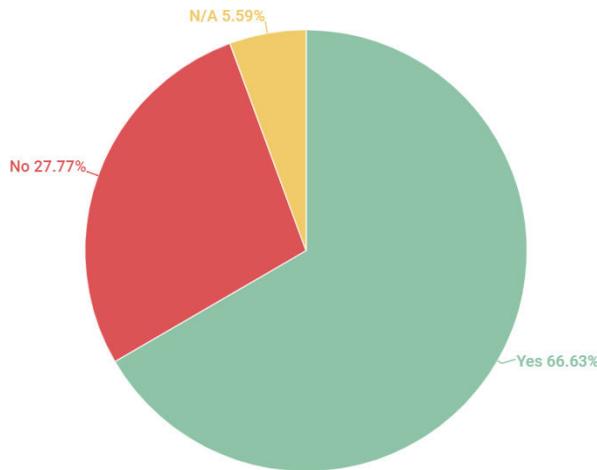
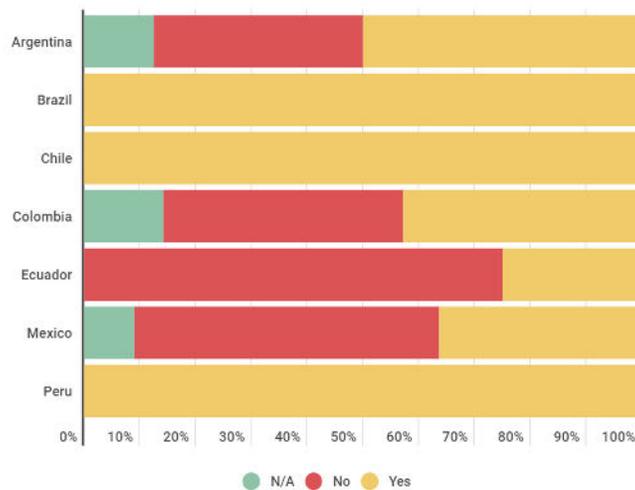


Figure 20 deploys the answers by jurisdiction, with a unanimous opinion in Brazil, Chile, and Peru.

**Figure 20: Antitrust authority has required the implementation of a compliance program by country**

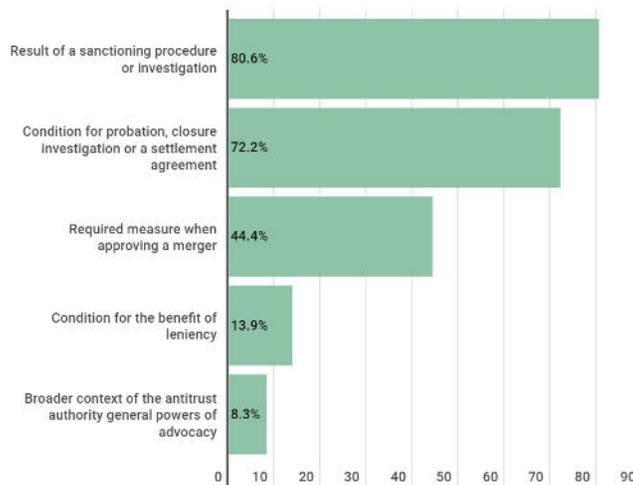


74 OECD, OECD Competition Committee Discussion Paper, Competition Compliance Programmes, 16 (June 2021), <http://oe.cd/ccp>.

75 Question 31 from the Questionnaire. “31. Are there any cases in which the antitrust authority of your country has required the implementation of a compliance program to a company? a. No, b. Yes, c. N/A.”

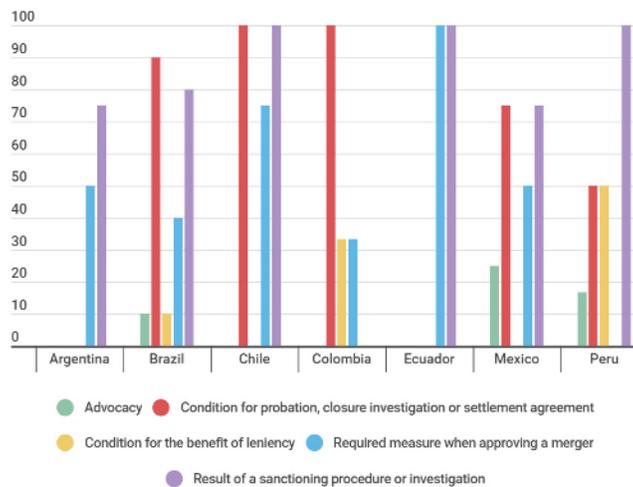
Furthermore, among those that sustain that antitrust authority has required the implementation of a compliance program,<sup>76</sup> 80.6% answered that this obligation could be required as a result of a sanctioning procedure or investigation for anticompetitive conduct by the company (for example, as an obligation together with the imposition of a fine for a cartel case), 72.2% as a condition for probation, closure of an investigation or a settlement agreement with the antitrust authority, and 44.4% as a required measure when approving a merger, as Figure 21 suggests.

**Figure 21: Instances when compliance programs could be imposed by agencies**



Then, when disaggregating by jurisdiction, some differences can be observed, as Figure 22 shows. For instance, Argentina, Ecuador, and Chile show a similar pattern: compliance programs have been required as a result of a sanctioning procedure or investigation and when approving a merger. In most countries, except Argentina and Ecuador, at least 50% of the attorneys coincide that the implementation of a compliance program could be required as a condition for probation, closure of an investigation, or settlement agreement.

**Figure 22: Instances when compliance programs can be imposed by agencies by country**



76 Question 32 from the Questionnaire. “32. If the previous answer is affirmative, in which instances can antitrust authorities of your country impose the implementation of a compliance program on a company? (You can choose more than one option): a. As a result of a sanctioning procedure or investigation for anticompetitive conduct by the company (for example, as an obligation together with the imposition of a fine for a cartel case), b. As a condition for probation, a closure of an investigation or a settlement agreement with the antitrust authority, c. As a condition for the benefit of leniency, d. As a required measure when approving a merger, e. In the broader context of the antitrust authority general powers of advocacy, f. In other instances (please mention which ones), g. N/A”.

### Box No. 7: Interviews results – Compliance programs as obligations or remedies

As can be seen in Figure 22, there is a disagreement between the attorneys from Argentina, Colombia, Ecuador and Mexico in relation to whether the antitrust authority has requested the implementation of compliance programs to companies. The differences could be explained because the implementation of a compliance program in order to obtain an investigation closure or a merger approval could not strictly be understood as a measure imposed by the antitrust authority, but rather a commitment offered voluntarily by the parties to obtain these results during the course of the investigation, that once is offered it becomes an obligation for the companies in the final resolution. In any case, we summarize the explanations that practitioners from these countries gave us in their interviews in relation to these results.

In the case of Argentina, although there would be some cases in which the Argentine authority has accepted compliance as a commitment to approve a merger, the practitioner mentioned that these would be very few cases and of little relevance.<sup>77</sup>

The Colombian practitioner clarified that there would be cases in which the SIC has indeed accepted to close investigations for anti-competitive conduct after the company offered a commitment to adopt a compliance program in the future, although these are relatively recent cases.<sup>78</sup>

The Ecuadorian practitioner pointed out that there are precedents in which the SMPC has accepted the implementation of a compliance program as a condition for approving a merger,<sup>79</sup> but that some of these cases may not be known by all practitioners since the authority does not always publish the final decisions of their cases.

Finally, in the case of Mexico, the practitioner revealed not being aware of cases in which the Mexican agency had imposed compliance programs to companies or accepted their implementation as a commitment in order to close an investigation.

## VI.3 Perception of the level of complexity of compliance programs in each country

In recent years, Latin American countries have closely followed the advances on antitrust compliance programs of developed jurisdictions. However, progress can be uneven among jurisdictions.

77 See, for example, CNDC's Decision No. 835 of October, 2010, on merger between PIRELLI & C S.P.A. and others, File S01:0014652/2009, which established the need for the parties to the merger to undergo a training on free competition regulation conducted by the CNDC. See also CNDC Decision No. 2018-363 of June 2018 on the acquisition of a pasta business unit from MONDELEZ ARGENTINA S.A. and INTERCONTINENTAL BRANDS LLC on behalf of MOLINOS RIO DE LA PLATA S.A. and MOLINOS IP, File S01:0231837/2014, which recommended that the acquiring parties intensify the specialization in competition of their Compliance Management and that their compliance area train directors, executives and commercial managers on proper competitive action in the dry pasta market.

78 See, for example, SIC Resolution No. 36870 of June 2021, which closed the investigation against Taxi Imperial S.A.S. and José Eduardo Hernández for a case of abuse of dominant position and in which the implementation of a competition compliance manual was accepted as a remedy, available at: <https://www.sic.gov.co/sites/default/files/files/2021/RESOLUCION%CC%81N%2036870%20DEL%2016-06-2021%20-%20ACEPTA%20GARANTI%C%81AS%2C%20ARCHIVA%20INVESTIGACION%CC%81N%20-%20TAXI%20IMPERIAL.pdf>

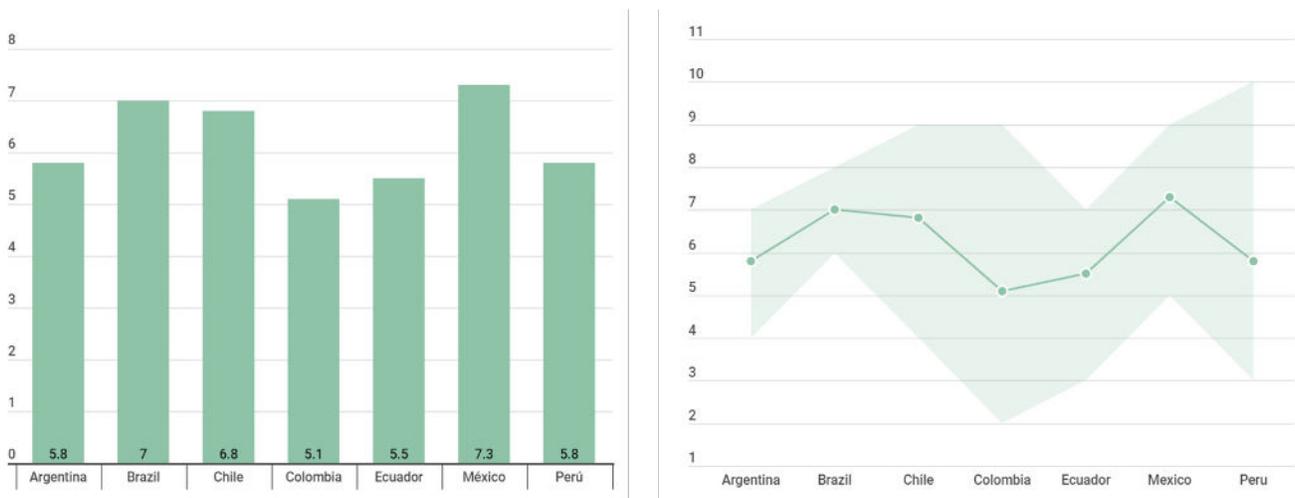
79 See Resolution of the SCPM in file No. SCPM-CRPI-022-2020 on the acquisition of GLOBALIA by IB OPCO HOLDING, available at: <https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/04/RESOLUCION-SCPM-CRPI-022-2020-VERSION-NO-CONFIDENCIAL.pdf>

When asked to rate the seriousness and comprehensiveness<sup>80</sup> of the antitrust compliance programs applied by companies of their country, on a scale of 1 to 10, respondents' rates showed that the mean for Latin America in this subject was of 6.35 points. Specifically, 70% of the attorneys (38 out of 54) considered a value higher than 5, meanwhile, 30% considered a lower value.

Nonetheless, the average varies by jurisdiction. The highest mean was for Mexico (7.3), followed by Brazil (7), and Chile (6.8), as depicted in the left panel of Figure 25.

Furthermore, the answers also vary among lawyers from the same jurisdiction. The right panel of Figure 23 shows the average for each country, the minimum, and maximum score assigned. The variation on the score assigned is greater in Colombia and Peru, followed by Chile, showing less consensus between respondents on the seriousness and comprehensiveness of compliance programs applied in such jurisdictions. On the contrary, the variation is reduced in Argentina and Brazil.

**Figure 23: Seriousness and comprehensiveness of antitrust compliance programs (mean and dispersion<sup>81</sup>)**

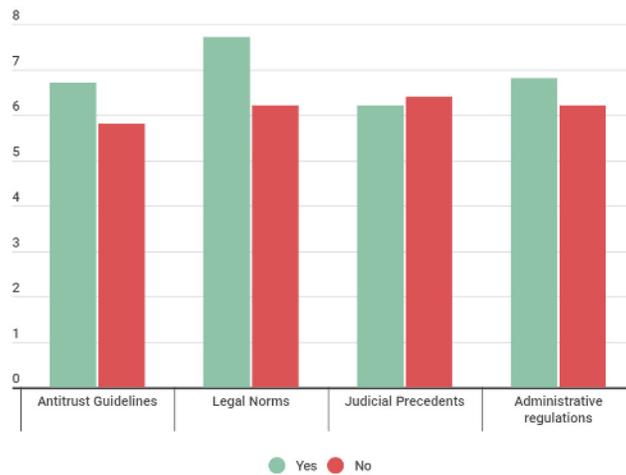


Furthermore, one would expect that the regulation and recognition of the program would increase the seriousness of the antitrust compliance program. As seen in Figure 23b, if it is recognized through antitrust guidelines or legal norms, on average, the perception of practitioners on the seriousness and completeness of compliance programs is greater.

80 The standard deviation is a measure of the dispersion of the data around the mean. Higher averages mean higher dispersion or less consensus. The standard deviation for the entire sample takes a value of 1.8. When analyzed by country, Argentina (1.3), Brazil (0.7), Chile (1.5), and Mexico (1.3) show a lower value. On the contrary, Colombia (2.3), Ecuador (1.9) and Peru (3.1) show a higher value.

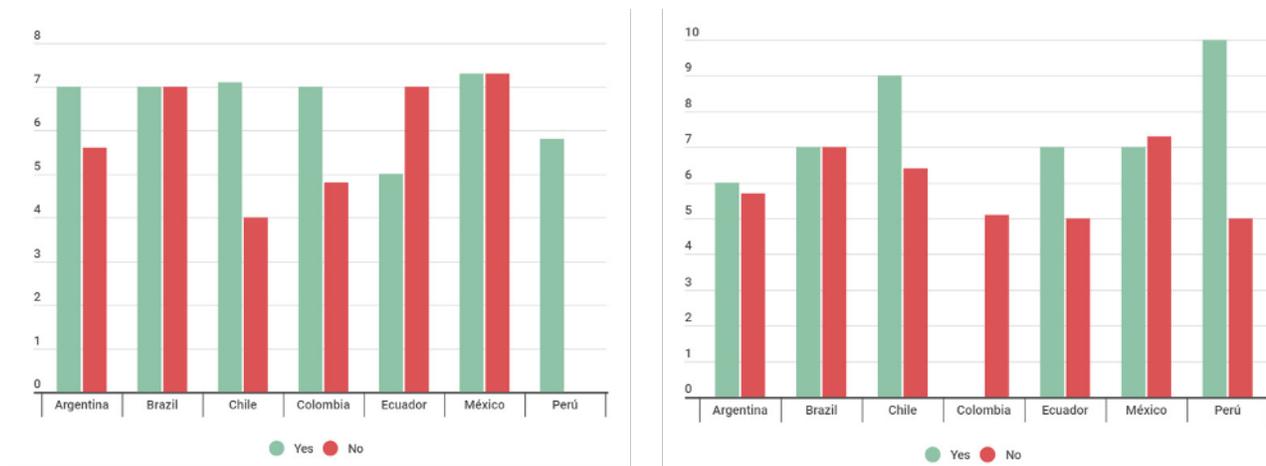
81 The standard deviation is a measure of the dispersion of the data around the mean. Higher averages mean higher dispersion or less consensus. The standard deviation for the entire sample takes a value of 1.8. When analyzed by country, Argentina (1.3), Brazil (0.7), Chile (1.5), and Mexico (1.3) show a lower value. On the contrary, Colombia (2.3), Ecuador (1.9) and Peru (3.1) show a higher value.

**Figure 23b: Seriousness and comprehensiveness by source of regulation**



Even more, this hypothesis is sustained in each of the jurisdictions, except in Ecuador (antitrust guidelines) and Mexico (legal norms), as Figure 23c and 23d show. However, since the sample is small, in certain categories there is only one observation that determines the country average. In the case of antitrust guidelines, this occurs in Argentina and Colombia (only one attorney per country responded yes), Chile, and Ecuador (only one attorney per country responded no). In the case of legal norms, just one attorney from each country (except Colombia) responded *yes*.

**Figure 23c (antitrust guidelines) and Figure 23d (legal norms)**

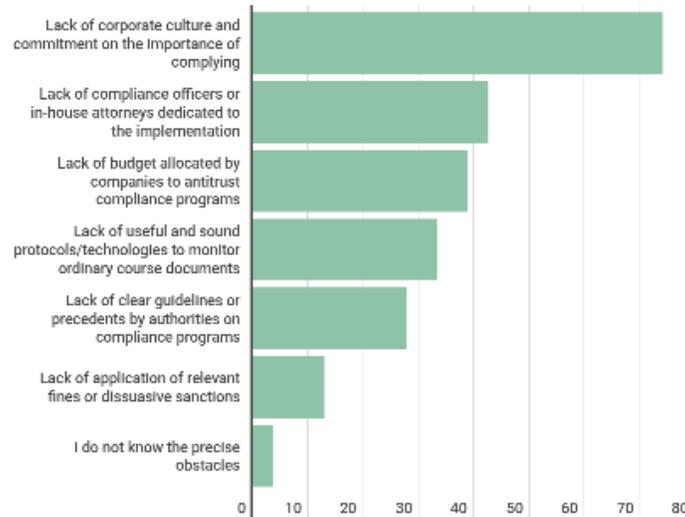


To probe more accurately the development of compliance programs, the respondents were asked about the main obstacles<sup>82</sup> that, in their experience, limit companies to implement complete and serious antitrust compliance programs. General answers are deployed in Figure 24. The main reasons adduced were the lack of corporate culture and commitment of

82 Question 17 from the Questionnaire. “17. In your experience, what are the main obstacles for companies to implement complete and serious antitrust compliance programs? (You can choose more than one option): a. The lack of corporate culture and commitment of senior executives on the importance of complying with antitrust regulations, b. The lack of budget allocated by companies to antitrust compliance programs, c. The lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs, d. The lack of useful and sound protocols/technologies to monitor ordinary course documents to detect potential violations, e. The lack of clear guidelines or precedents by authorities on compliance programs, f. The lack of application of relevant fines or dissuasive sanctions by antitrust authorities when an anticompetitive behavior is committed, g. I do not know the precise obstacles, h. Other obstacles \_\_\_\_\_ (please indicate which ones)”.

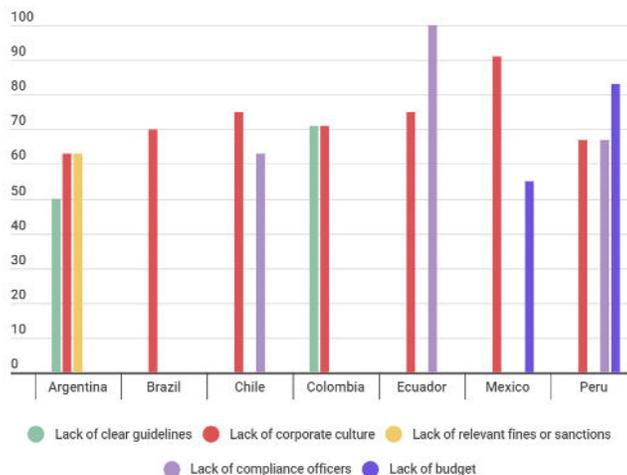
senior executives to the importance of complying with antitrust regulations (74%) and the lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs (43%).

**Figure 24: Main obstacles for companies to implement complete and serious antitrust compliance programs**



Interestingly, when sorting by country, some differences can be found. Figure 25 displays the reasons that more than 50% of the attorneys from each country agree on. For instance, more than 50% of the attorneys in Chile and Ecuador agree that the main obstacles are the lack of corporate culture and commitment on the importance of complying with antitrust regulation, and the lack of compliance officers or in-house attorneys dedicated to the implementation of compliance programs. Peru also considers those two reasons and includes the lack of budget allocated by companies to antitrust compliance programs. Mexican attorneys also believe there is a lack of budget and of corporate culture. On the other hand, attorneys from Argentina believe that the absence of relevant fines or dissuasive sanctions by antitrust authorities when anticompetitive behavior is committed is one of the main obstacles. On the other hand, Argentina and Colombia agree on the lack of clear guidelines or precedents by authorities on compliance programs. Lastly, for Brazilian attorneys the lack of corporate culture is the main obstacle.

**Figure 25: Main obstacles for companies to implement complete and serious antitrust compliance programs by country**



### Box No. 8: Interviews results – Obstacles for implementing compliance programs

In the interviews, when asked about their impressions on results from Figure 25, practitioners from Argentina, Brazil, Ecuador and Colombia confirmed that, in their countries, the lack of corporate culture and commitment of senior executives to the importance of complying with antitrust regulations would be a strong obstacle for the implementation and development of antitrust compliance programs.<sup>83</sup> However, the Brazilian practitioner pointed out that *“the lack of culture is actually related to weaker enforcement”*, as *“enforcement environment has deteriorated significantly over the past few years”*.<sup>84</sup>

Practitioners from Ecuador and Colombia stated that this scenario has been improving over the last years in their countries. In the case of Colombia, the practitioner stated that this improvement could be explained by the publicity of recent cartel cases that have been sanctioned by the Colombian antitrust authority (SIC).

As to the lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs, the Peruvian practitioner confirmed that in Peru *“it is difficult to find people available in the market with these characteristics and with the willingness to work in a company”*.

## VI.4 Elements that companies usually incorporate into compliance programs and the frequency on which they are implemented

As the OECD (2021) stated, although there is no one-size-fits-all definition, the main elements of a corporate compliance program are well known and many antitrust agencies around the world have identified the essential elements that an effective program should have.<sup>85</sup> The OECD paper recommends as a good starting point to consider the DoJ Compliance Guidelines launched in 2019,<sup>86</sup> since it is one of the most recent guidelines from a sophisticated agency and contains practical and useful checklists.

In this regard, respondents were asked about their experience on the elements usually included in antitrust compliance

83 The COFECE's representative also indicated that the lack of corporate culture within the companies and the little budget allocated to implementing compliance programs could act as obstacles to the development of compliance in Mexico, especially in smaller companies that have less budget and less knowledge on competition regulations.

84 In this regard, the Brazilian authority stated that there would be a broader lack of competition culture, especially in small cities and more distant regions of the country, a situation that the agency is currently trying to address.

85 Detection and facilitation of prompt reporting, senior management involvement, monitoring and auditing, compliance incentives, and third-party compliance are some of the essential elements identified by the OECD. OECD, Competition Committee Discussion Paper, 32.

86 DOJ, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations.

programs<sup>87</sup> applied by companies in their country. The three most mentioned categories were: training of executives and managers on antitrust regulation and benefits of reporting anticompetitive behavior to the authorities (92.6%), the development of companies’ antitrust compliance guidelines or manuals (77.8%), and the designation of a compliance officer (66.7%), as can be seen in Figure 26.

These are very well known and essential elements of compliance programs. However, other important elements such as the periodic internal audits of executive’s communications, the periodic tests of the effectiveness of implemented antitrust compliance programs, and the review of internal disincentives to comply with antitrust regulation (i.e. ambitious performance goals and performance based salary schemes) did not generate as much consensus as to their general application by companies in the region.

**Figure 26: Elements usually included in antitrust compliance programs<sup>88</sup>**

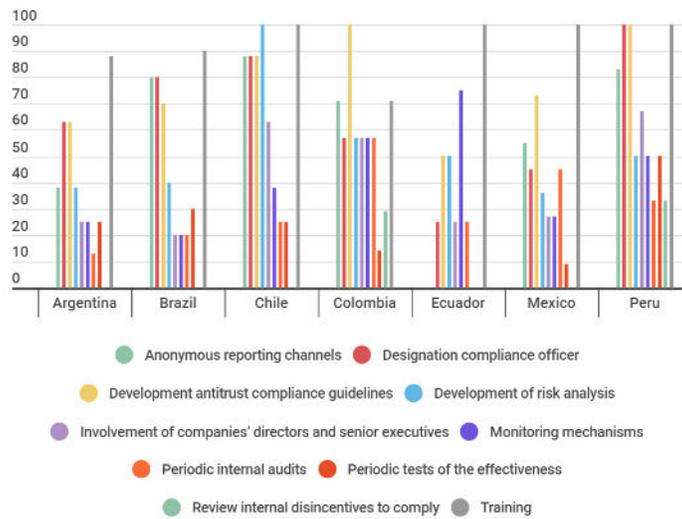


As to the answers by country, there are some interesting and heterogeneous results, as Figure 27 shows. Unanimously, training of executives and managers on antitrust regulation and the benefits of reporting the anticompetitive conducts (grey bar), is regularly incorporated in compliance programs. The same occurs with the development of companies’ antitrust compliance guidelines or manuals (yellow bar).

87 Question 18 from the Questionnaire. “18. In your experience, which elements are usually included in antitrust compliance programs applied by companies in your country? (You can choose more than one option): a. Training of executives and managers on antitrust regulation and benefits of reporting anticompetitive behavior before authorities, b. Periodic internal audits of executive’s communications, c. Monitoring mechanisms and effective internal sanctions against individuals who commit anticompetitive behavior within the company, d. The designation of a compliance officer, e. The development of risk analysis based on the particularities of each company and the markets in which they operate, f. The involvement of companies’ directors and senior executives in the development and implementation of antitrust compliance programs, g. The existence of anonymous reporting channels within the company for workers who want to report anticompetitive behaviors, h. The development of companies’ antitrust compliance guidelines or manuals, i. Periodic tests of the effectiveness of implemented antitrust compliance programs through surveys, interviews or internal evaluations, j. The review of internal disincentives to comply with antitrust regulation, such as ambitious performance goals and performance-based salary schemes, k. Others \_\_\_\_\_ (please indicate which elements)”.

88 The small right rectangle represents the review of internal disincentives to comply with antitrust regulation, such as ambitious performance goals and performance-based salary schemes. Only 7.4% of respondents selected this option.

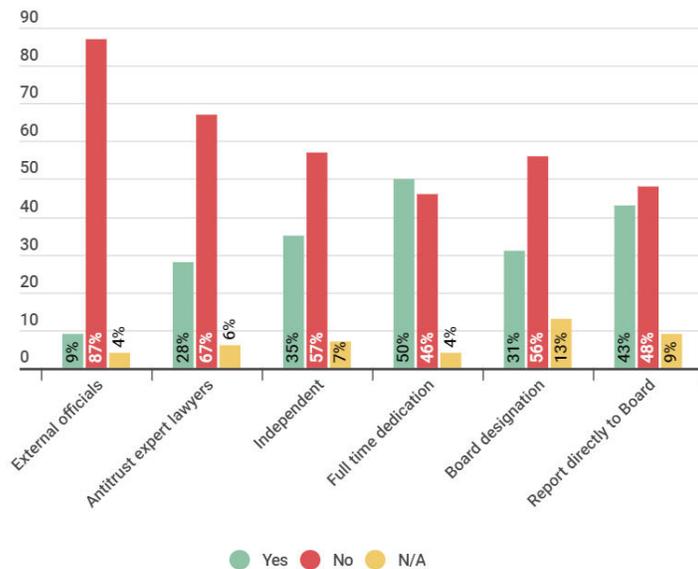
**Figure 27: Elements usually included in antitrust compliance programs by country**



Moreover, Colombia and Peru’s compliance programs seem to be more heterogeneous, since more elements are included but with less agreement among attorneys. On the contrary, Brazil, Mexico, and to a lesser extent, Chile’s compliance programs contain fewer elements but with a higher degree of agreement between the respondents.<sup>89</sup>

Respondents were also asked about some characteristics that compliance officers appointed by the companies usually have.<sup>90</sup> Even though, in lawyers’ experience, most companies include the designation of compliance officers in their programs, usually, they are not officials external to the company, they are not experts on antitrust matters nor independent of the top executives of the firm and do not report directly to the Board of Directors, as Figure 28 shows. Nonetheless, according to respondents, most of them have full time dedication within the company.

**Figure 28: Characteristics compliance officers**

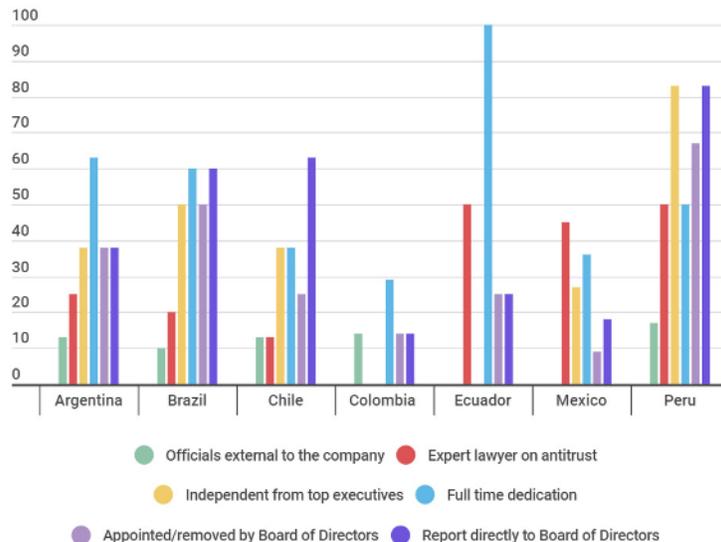


<sup>89</sup> Table 1 in the Annex shows all the data.

<sup>90</sup> Question 19 from the Questionnaire. “19. In your experience, which of the following characteristics usually have the compliance officers appointed by the companies in your country: a. They are officials external to the company: YES/NO, b. They are expert lawyers on antitrust regulation: YES/NO, c. They are independent from the top executives of the company: YES/NO, d. They have full time dedication within the company: YES/NO, e. They can only be appointed and removed by the company’s board of directors: YES/NO, f. They report directly to the company’s Board of Directors: YES/NO”.

When disaggregating by country, some differences can be seen. For simplicity, Figure 29 reports characteristics that compliance officers usually do have (i.e. when the answer of the lawyer was yes), in attorneys’ experience.

**Figure 29: Characteristics compliance officers<sup>91</sup>**



Regarding the expertise in antitrust regulation of compliance officers, Ecuador and Peru seem more advanced, as 50% of attorneys of their jurisdiction sustain. Interestingly, 83% of the attorneys from Peru state that, in their experience, compliance officers are independent from top executive firms, followed by Brazil (50%). In most jurisdictions, except for Chile, Colombia, and Mexico, more than half of the attorneys stated that compliance officers have full time dedication in their position.

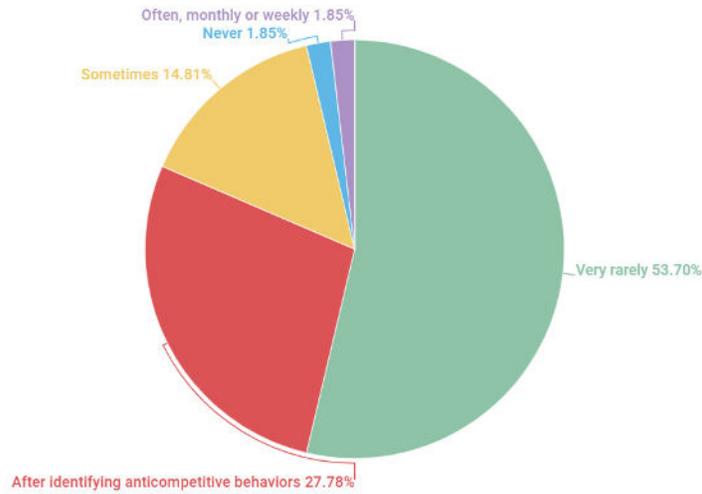
In Brazil and Peru, the majority of the respondents’ stated that, in their experience, compliance officers are appointed and removed by the companies’ Board of Directors and that they report directly to them.

Regarding the frequency<sup>92</sup> with which compliance programs implemented by companies are reviewed, applied or audited by top company executives, compliance officers or external company advisers, most of the respondents stated that this happens very rarely –i.e. no more than once a year– (52.7%), follow by the answer sometimes –i.e. a couple of times a year– (14.8%), or only after identifying anticompetitive behaviors within the company (27.8%), as Figure 30 shows.

91 Figure A in the Annex shows the comparison by category and country.

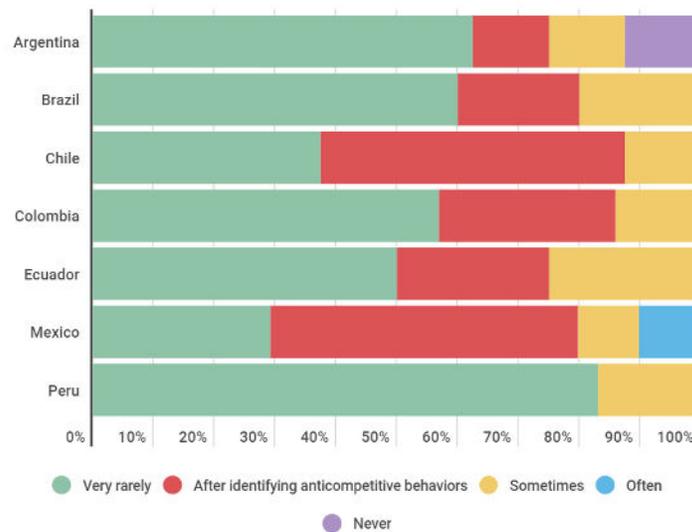
92 Question 20 from the Questionnaire. “20. In your experience, how often are antitrust compliance mechanisms reviewed, applied and audited by top company executives, compliance officers or external company advisers? (Please choose one): a. Never, b. Only after identifying anticompetitive behaviors within the company, c. Very rarely, no more than once a year, d. Sometimes, a couple of times a year, e. Often, monthly or even weekly, f. N/A”.

**Figure 30: Frequency compliance programs reviews**



Once again, results are heterogeneous among jurisdictions, as Figure 31 shows. In most countries, in respondents' experience, top company executives, compliance officers, or external company advisers very rarely review, apply, and audit the antitrust compliance programs. Still, it appears that in opinion of some attorneys from Chile and Mexico, programs are reviewed after identifying anticompetitive behaviors within the company.

**Figure 31: Frequency of review of the compliance programs by country**



**Box No. 9: Interviews results – Shortcomings of Latin-American compliance programs**

In the interviews, when we asked the authorities about the deficiencies that they usually observe in the compliance programs applied in their countries, the authorities of Chile, Colombia and Peru highlighted that it is common for companies to establish compliance programs that meet certain formal requirements, but there still is a lack of serious efforts and commitment with an-

titrust compliance on behalf of the companies (“paper compliance programs”).

In this regard, the Chilean authority mentioned that while reviewing compliance programs, they have noticed a lack of involvement from the companies’ directors and senior managers in anti-trust compliance. In line with the survey results, the enforcer highlighted that compliance officers in Chile are not the most prestigious professionals, they have not the same wage and status as companies’ managers, and that they rarely participate or interact with the companies’ board of directors.<sup>93</sup>

On the contrary, the representative of the Brazilian agency indicated that one of the deficiencies that can be found in the compliance programs is that too much emphasis is placed on the involvement of the top management of the companies, but the engagement of the employees –especially in local or regional markets in Brazil- is neglected.

In the Colombian authority experience, what many companies try to do is merely to comply with the formal requirements of the ICONTEC technical standard, without the intention of promoting a culture of competition at the highest level within the company, as, for example, antitrust compliance is usually left in the hands of the compliance officer, neglecting the involvement of the other divisions within the company.

In the same vein, the Peruvian authority indicated that, in their experience, the only objective that some companies seek when implementing a compliance program is to have proof that it has been implemented, and there would be no serious efforts to generate a culture of compliance within organizations. The agency’s representative also expressed that “lawyers are putting a lot of emphasis on how to prevent executives from using certain language” or put “more emphasis on leaving no trace, rather than preventing companies from engaging in anti-competitive conduct”.

Finally, the Mexican agency’s representative pointed out that there could be deficiencies in compliance programs when companies take other companies’ programs as references and do not adjust them to their own reality, and also when companies do not carry out a proper follow-up and monitoring of the implemented compliance program.

Although the development of compliance programs has traditionally been linked to the legal profession, in antitrust matters, the understanding of the dynamics of the markets in which economic agents participate and the appropriate detection of anticompetitive risks within companies, are issues in which non-legal professionals, especially economists, are usually in a better position to assess.

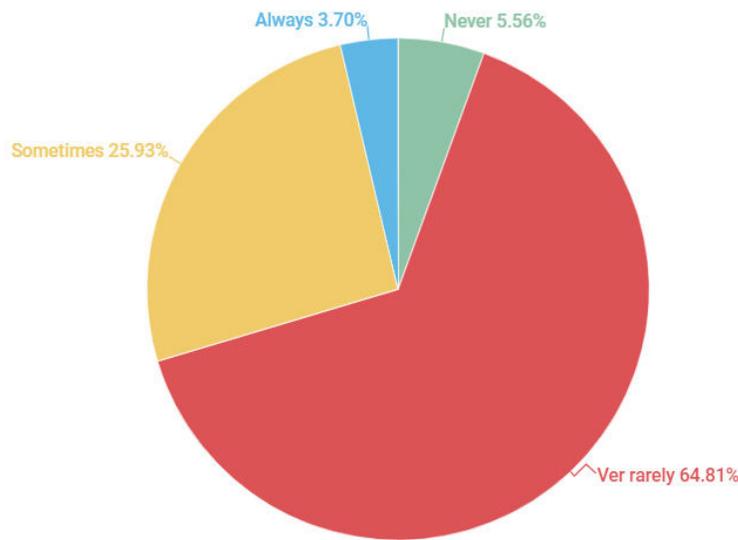
In this regard, interestingly, only 29.6% of the respondents affirmed that non-lawyer professionals,<sup>94</sup> such as economists, sometimes or always participate in the design, implementation, or monitoring of compliance programs applied by companies in their country. Conversely, the majority (70.4%) stated that non-lawyer professionals never or very rarely participate

93 Indeed, the Chilean authority indicated that “normally, from what we see here these are paper compliance programs that do not involve the main executives or the board of directors (...) and do not give importance to the compliance officer”.

94 Question 11 from the Questionnaire. “11. In your experience, how often do non-lawyer professionals (for example, economists) participate in the design, implementation, or monitoring of antitrust compliance programs applied by companies in your country? a. Never, b. Very rarely, c. Sometimes, d. Always, e. N/A”.

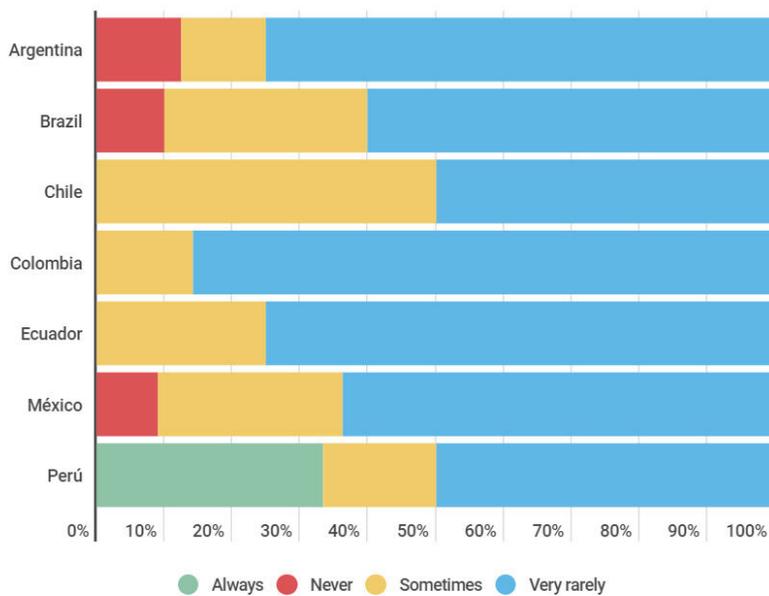
in compliance programs, as seen in Figure 32.

**Figure 32: Participation of non-lawyers**



Noteworthy, both attorneys who answered that non-lawyer professionals always participate in developing compliance programs, currently practice in Peru. A dissection of the responses by country on this matter can be seen in Figure 33.

**Figure 33: Participation of non-lawyers by country**



### Box No. 10: Interviews results – Participation of non-legal professionals in compliance

When we asked practitioners about the reasons that would explain the low participation of non-legal professionals, especially economists, in the design and implementation of compliance programs, the attorneys from Argentina, Brazil,<sup>95</sup> and Ecuador explained that this could be related to the fact that compliance is usually a topic related to the legal profession, or in which lawyers are the gateway.

The practitioner from Colombia indicated that, although there are economic consultants that could participate in compliance programs, this issue is just beginning to develop in said country.

In the case of Chile, one practitioner commented that they usually involucrate economists in antitrust compliance, but that the general low participation of these professionals could be explained by the fact that the prices that companies are willing to pay for the implementation of compliance programs have been falling and also because this matter tends to be concentrated in the hands of attorneys.

In the perception of the Mexican practitioner, economists rarely participate in antitrust compliance, since there are few economists who are dedicated exclusively to antitrust issues and their fees can be very high.

In contrast with other jurisdictions of the region, according to the Peruvian practitioner, the greater participation of economists in antitrust compliance that seems to be in Peru could be explained by the fact that INDECOPI requires the implementation of a risk map in compliance programs, an issue that has led to a higher participation of auditors in the design stage of the programs.<sup>96</sup>

## VI.5 Use of forensic software, algorithms and artificial intelligence in antitrust compliance

In addition to classic elements of compliance programs, in recent times a special interest has arisen in the use of more complex tools of an economic nature, such as screening, and even the use of algorithms and artificial intelligence to detect anti-competitive conduct within a company. For example, screening could be more effective than more traditional tools such as training and may also help convince authorities that all available compliance tools are being used proactively.<sup>97</sup>

However, Figure 34 suggests that, in lawyers' opinion, most jurisdictions barely use special software or hire external computer experts,<sup>98</sup> or forensic companies to review internal communications in the context of antitrust compliance audits.

95 The Brazilian practitioner mentioned that the existence of the attorney-client privilege with respect to lawyers (and not for other professions) would also be a good explanation for these results.

96 Indeed, the Peruvian authority confirmed us that "it only accepts multidisciplinary programs, where there is an adequate identification of risks".

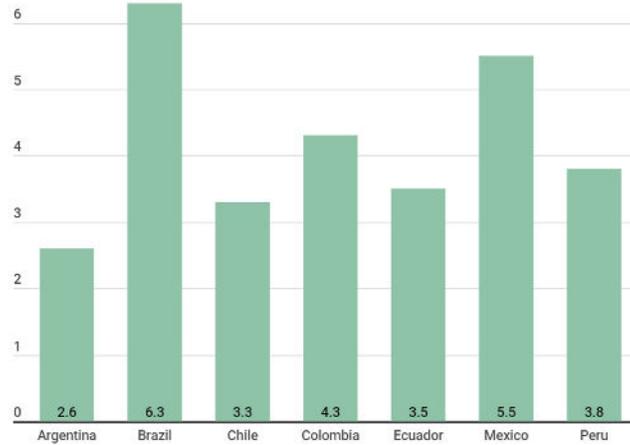
97 Rosa M. Abrantes-Metz & Albert D. Metz, Why Screening is a "Must Have" Tool for Effective Antitrust Compliance Programs, CPI Antitrust Chronicle (November 2019), [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC\\_November\\_II.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC_November_II.pdf).

In the same vein, according to Joseph E. Harrington, a cartel screening program also credibly conveys a desire to avoid cartels and that it is not simply "cheap talk" to placate a company's compliance division. Joseph E. Harrington, Jr., *Cartel screening is for companies, law firms, and economic consultancies, not just competition authorities*, CeCo Investigations (2021), <http://www.centrocompetencia.com/category/investigaciones>

98 Question 21 from the Questionnaire. "21. On a scale of 1 to 10, in your experience, how often do companies of your country use special software or hire external computer experts or forensic companies to review internal communications in the context of antitrust compliance audits? 1 (never) - 10 (always)"

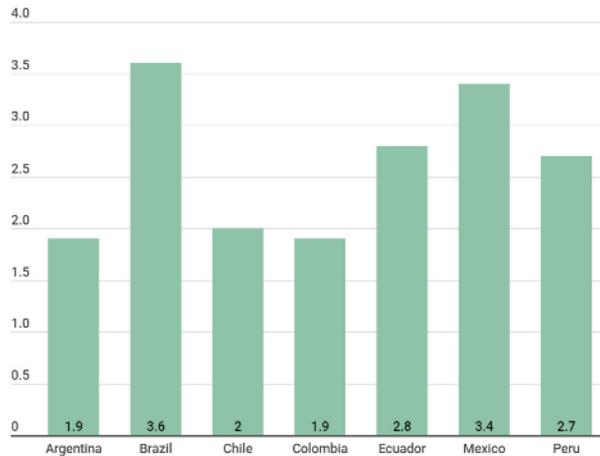
Moreover, on a scale of 1 to 10, the average for Latin America was 4.4 points. As depicted in Figure 34, Brazil and Mexico seems to be the most advanced jurisdictions on the matter.

**Figure 34: Use of special software or hire external computer experts or forensic companies to review internal communications by country**



Similarly, Figure 35 shows that, in respondents’ view, no jurisdiction is advanced in the use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors within companies,<sup>99</sup> as the average was 2.6 points, in a scale of 1 to 10. Again, compared to the other jurisdictions, Brazil and Mexico showed further development in this subject.

**Figure 35: Use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors by country**

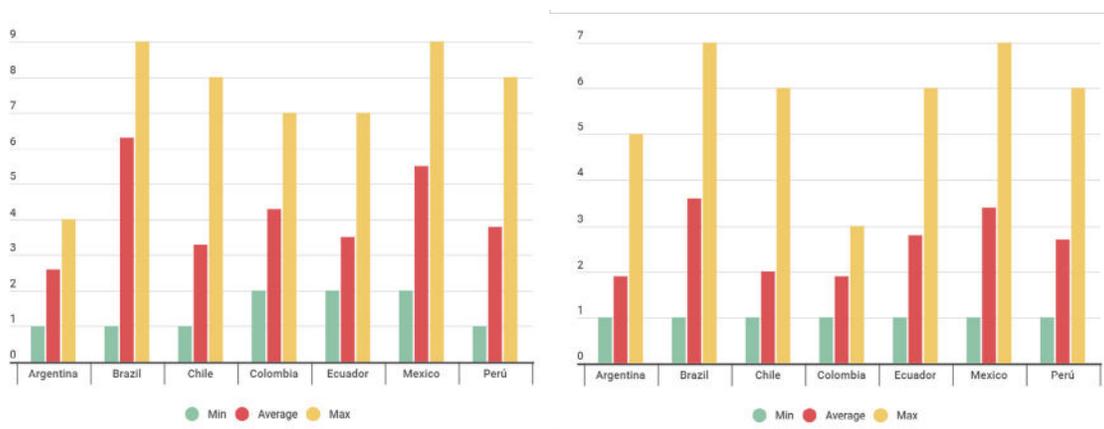


It is worth noting that in the last two topics the dispersion of the answers is high, which means that experiences may vary a lot among attorneys from the same jurisdiction. Figure 34b shows the minimum, average, and maximum score on the use

<sup>99</sup> Question 22 from the Questionnaire. “22. In relation to internal auditing and monitoring, on a scale of 1 to 10, in your experience, how advanced are the companies of your country in the use of algorithms and artificial intelligence to monitor and detect anticompetitive behaviors? 1 (there is no development in this matter) - 10 (very advanced)”.

of special software’s, or external computer experts to review internal communications<sup>100</sup> by country and Figure 35b shows it for the use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors<sup>101</sup> by country.

**Figure 34b (special software’s, or external computer experts) and Figure35b (use of algorithms and artificial intelligence)**



For instance, even when countries such as Argentina, Chile, and Colombia have lower than average values in both categories (thus, show less development on the matter), attorneys from these jurisdictions agree more on their answers, as the difference between the higher and lower value is smaller (especially in the use of algorithms and artificial intelligence).

**Box No. 11: Interviews results – Use of forensic software, algorithms and artificial intelligence**

When asked about the use of special software or forensic companies’ assistance to review internal communications in the context of antitrust compliance audits, practitioners from Colombia,<sup>102</sup> Ecuador,<sup>103</sup> México,<sup>104</sup> and Peru<sup>105</sup> expressed that the apparent low use of these technologies could be explained by the high costs that they imply for the companies. In contrast, the Brazilian practitioner indicated that there has been progress in this matter in Brazil, and that while forensic monitoring was previously carried out by external providers, today many companies have their own in-house forensic experts.

When asked about the use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors in the context of a compliance program, the Brazilian practitioner told us

100 The standard deviation for the entire sample takes a value of 2.5. When analyzed by country Argentina (1.3), Brazil (2.4), Chile (2.3), Colombia (2), Ecuador (2.4), and Mexico (2.1), show a lower or very similar value. On the contrary, Peru (2.9) show a higher value.

101 The standard deviation for the entire sample takes a value of 1.8. When analyzed by country Argentina (1.5), Brazil (1.8), Chile (1.7), and Colombia (0.9) show a lower or very similar value. On the contrary, Ecuador (2.2), Mexico (2), and Peru (2.3) show a higher value.

102 The practitioner from Colombia mentioned that although the antitrust authority does use these technologies in its investigations, they are very expensive for private parties.

103 The practitioner from Ecuador explained that the low use of these technology by the antitrust authority could also explain this situation. The practitioner also indicated that they have used international forensic experts in a few very specific cases.

104 Despite the fact that the Mexican practitioner stated that their legal firm has internal software for forensic, many firms do not have these internal capacities and have to contract these services externally to Mexican providers who are not specialists in antitrust matters, and can be very expensive.

105 The practitioner from Peru also pointed out that although their legal firm does not have forensic software, these are usually hired to external providers.

that its use is just starting in Brazil, but that there would be no great incentives for its development due to the low level of enforcement currently existing in the country. In the case of Chile, one practitioner mentioned that indeed they have used this type of technology in some cases. The rest of the practitioners did not refer specifically to the use of algorithms and artificial intelligence in their countries.

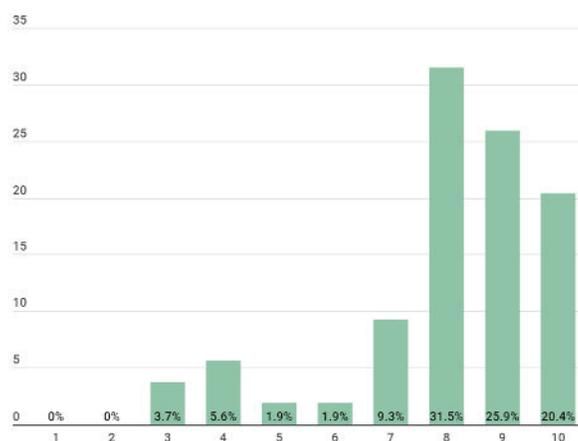
Finally, it should be noted that both for the use of forensic software and the use of algorithms and artificial intelligence, the Argentinean practitioner stated that the use of these technologies in Argentina would be non-existent, both by the private sector and the antitrust authority.<sup>106</sup>

## VI.6 Influence of foreign regulation and implementation of antitrust compliance programs.

In order to understand the level of development of antitrust compliance programs applied in the region, respondents were also asked about the level of influence that compliance programs adopted by parent companies abroad have on the programs applied by the subsidiaries in Latin America, and which are the foreign guidelines followed by the antitrust authorities, if so.

By large, in the respondents' view, most subsidiary companies in Latin America have adopted antitrust compliance programs influenced by parent companies abroad.<sup>107</sup> As a matter of fact, the average, on a scale of 1 to 10, is 8.1 points. Figure 36 shows that most of the answers (77.8%) range between 8 and 10 points, for all Latin American countries.

**Figure 36: Level of influence of compliance programs adopted by parent companies abroad**



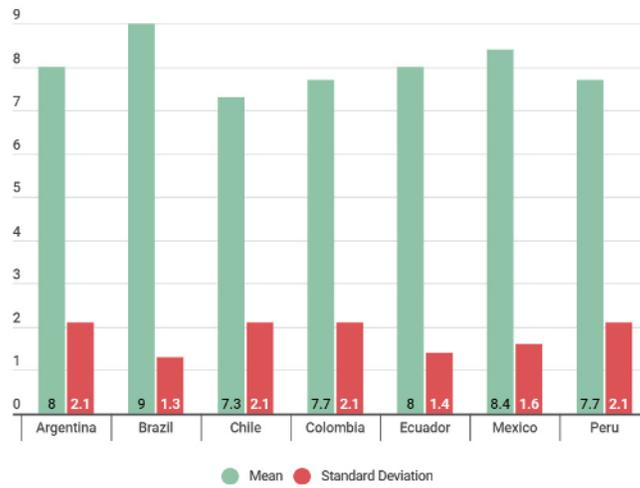
When decomposing by country, the higher averages are from Brazil, Mexico, Argentina, and Ecuador. Figure 37 also shows the standard deviation by country, which is a measure that indicates how dispersed the data is relative to the mean. Thus, a higher value for the standard deviation means more heterogeneous answers by attorneys from each jurisdiction.<sup>108</sup>

<sup>106</sup> Specifically, the Argentinean practitioner pointed out that “neither from the private sector nor the public sector have I perceived even the remote possibility of the existence of an investment in these issues”.

<sup>107</sup> Question 25 from the Questionnaire. “25. On a scale of 1 to 10, what do you think is the level of influence that antitrust compliance programs adopted by parent companies abroad have on the programs applied by subsidiaries in your country? 1(No influence) – 10 (Total influence)”.

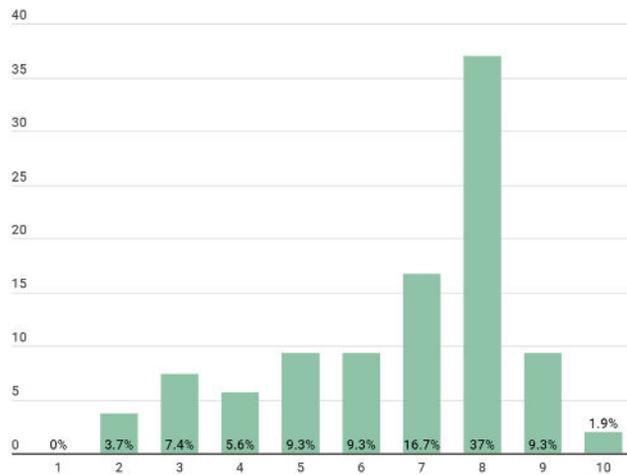
<sup>108</sup> In fact, the total standard deviation was of 1.8, meaning that Brazil, Ecuador and Mexico have a smaller standard deviation than the total deviation, that is, a smaller dispersion of the data.

**Figure 37: Level of influence of compliance programs adopted by parent companies abroad by country**



Then, when asked about how regularly companies follow guidelines or legal precedents of foreign antitrust authorities<sup>109</sup> when designing and adopting their antitrust compliance programs, the answers are more heterogeneous, and have a mean of 6.7 points (in a scale from 0 to 10), as seen in Figure 38.

**Figure 38: How regularly do companies follow the guidelines or legal precedents of foreign antitrust authorities**



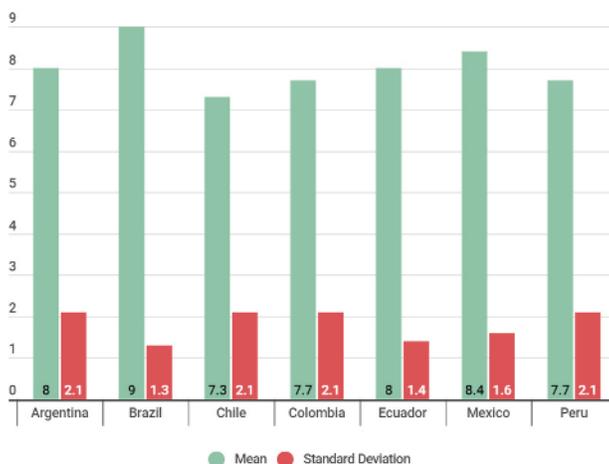
As Figure 39 shows, experience varies widely by jurisdiction. It seems that companies from Mexico, Brazil, and Peru follow guidelines or precedents of foreign antitrust authorities more closely.

On the contrary, companies from Chile and Ecuador seem to take more independent decisions from external antitrust authorities in compliance matters. Perhaps, as Figure 9 showed, because all of the attorneys from Chile and Ecuador agreed that there is a specific regulation on antitrust compliance programs in their own jurisdiction, mainly in the form of local guidelines from antitrust authorities. In Ecuador, there are also administrative regulations. Once again, the Figure also

<sup>109</sup> Question 26 from the Questionnaire. “26. On a scale of 1 to 10, in your experience, how regularly do companies follow the guidelines or legal precedents of foreign antitrust authorities when designing and adopting their antitrust compliance programs? 1(Never) – 10 (Always)”.

shows the standard deviations for each country. A higher value means that the data is more dispersed, or, in other words, there is less consensus.<sup>110</sup>

**Figure 39: How regularly do companies follow the guidelines or legal precedents of foreign antitrust authorities by country**



#### Box No. 12: Interviews results – Jurisdictions of reference

When asked about the jurisdictions they usually look when counseling clients on antitrust compliance, practitioners from Brazil, Ecuador,<sup>111</sup> Chile,<sup>112</sup> and Mexico<sup>113</sup> mentioned United States as the jurisdiction of reference. In fact, practitioners from Brazil and Chile highlighted that they have been using and following the guidelines on compliance recently published by the US DoJ in 2019.

Similarly, the authorities of Chile, Colombia,<sup>114</sup> Peru,<sup>115</sup> and Ecuador manifested that they are following or at least reviewing closely the new guidelines issued by the US DoJ. All in all, the majority of the antitrust agencies also analyze the developments of other countries within Latin American and Spain, as a European reference in antitrust compliance.<sup>116</sup>

110 In fact, the total standard deviation was of 2, meaning that Brazil, Colombia and Mexico have a smaller standard deviation than the total deviation, that is, a smaller dispersion of the data.

111 The Ecuadorian practitioner also expressed that they usually follow the developments of Spain and the European Union on these topics.

112 The Chilean practitioner also mentioned UK as one of the jurisdictions that they follow when counseling on antitrust compliance.

113 The Mexican practitioner pointed out that in matters of antitrust compliance they usually follow the developments of the United States, the European Union, Australia, Canada and the ICN guidelines.

114 Indeed, that authority from Colombia stated that *“we have a very close relationship with the DoJ, we follow them a lot”*.

115 In fact, the Peruvian authority expressed that *“for us, the United States will always be a benchmark in compliance issues”*.

116 The Argentinian agency said following closely the advances of other Latin American countries, especially Mexico, and the United States and the European Union. The Colombian authority mentioned that they follow the guidelines from the OECD and ICN, and the guidelines from Chile, Peru and Spain. The Ecuadorian agency indicated that they usually follow the advances of Chile, Colombia, México, Peru, Spain and the European Union. The Peruvian authority also follows closely the developments of Chile, Colombia, Spain and Mexico.

Finally, the authorities from Mexico,<sup>117</sup> Brazil, and Colombia indicated that they usually follow the recommendations of the International Competition Network (ICN) and the OECD regarding compliance.

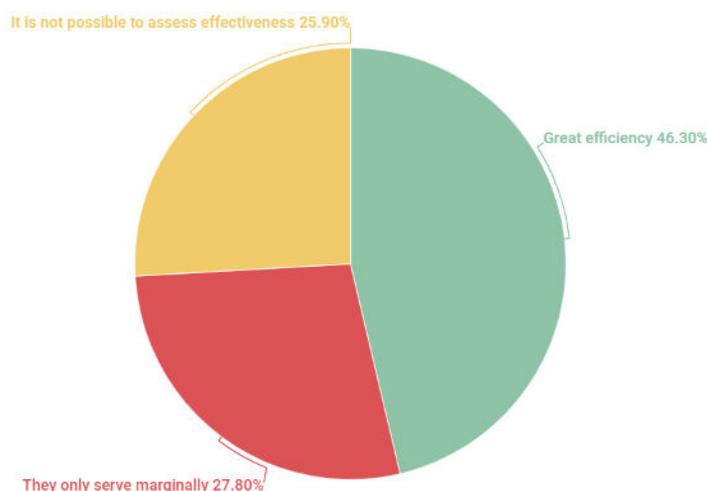
## ■ VII. CURRENT AND FUTURE DEVELOPMENT OF ANTITRUST COMPLIANCE PROGRAMS IN LATIN AMERICA

In this last section, we analyze the experts' perception on the level of importance and effectiveness that compliance programs have had in the last years in Latin America, how they believe this will develop in the future and if there are any initiatives in course aiming to encourage the implementation of compliance.

As the OECD points out, there has not always been a consensus on the effectiveness of compliance programs in detecting and preventing anticompetitive conduct and whether they should be rewarded by agencies.<sup>118</sup> In fact, there is still some skepticism about this matter, even in some of the most sophisticated antitrust agencies.<sup>119</sup>

First of all, it is important to mention that for 46.3% of lawyers, antitrust compliance programs have great efficiency,<sup>120</sup> and they make it possible to early detect anti-competitive behaviors inside companies. Nonetheless, the remaining 50% is more skeptical about the level of effectiveness of antitrust compliance programs on preventing and detecting anticompetitive practices, as Figure 40 suggests.

**Figure 40: Effectiveness antitrust compliance programs**



117 The Mexican authority also mentioned that they have reviewed the Canadian guidelines on this matter and the development of the European Commission (which is one of the jurisdictions that has denied the granting of benefits for the implementation of antitrust compliance).

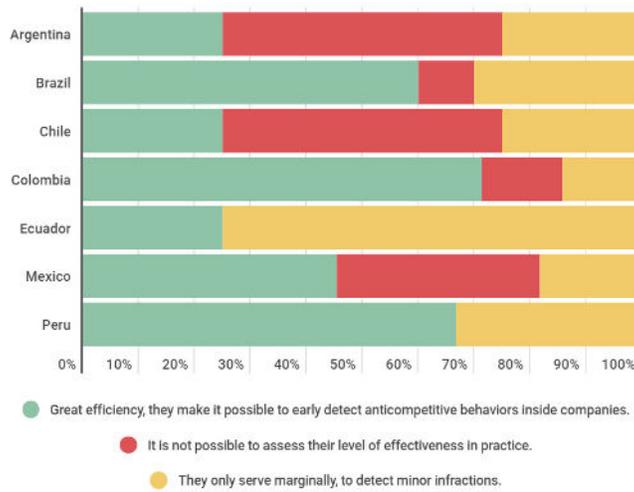
118 OECD, *OECD Competition Committee Discussion Paper*, 9.

119 Anne Riley, *Reluctance to Embrace and Recognize Corporate Compliance Efforts*, CPI Antitrust Chronicle (November 2019), [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC\\_November\\_II.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC_November_II.pdf)

120 Question 27 from the Questionnaire. "27. In general terms, what do you think is the level of effectiveness of antitrust compliance programs when it comes to preventing and detecting anticompetitive practices within companies? (Please choose one): a. No efficacy, b. Great efficiency, they make it possible to early detect anticompetitive behaviors inside companies, c. They only serve marginally, to detect minor infractions, d. It is not possible to assess their level of effectiveness in practice".

Attorneys from Colombia, Peru, and Brazil tend to believe more in the effectiveness of antitrust compliance programs, while experts from Argentina, Chile, and Ecuador are more skeptical, as Figure 41 shows.

**Figure 41: Effectiveness antitrust compliance programs by country**



Likewise, Figure 41b depicts the fraction of attorneys for each country that believes that the level of effectiveness of anti-trust compliance programs is great, and they make it possible to early detect anticompetitive behaviors inside companies.

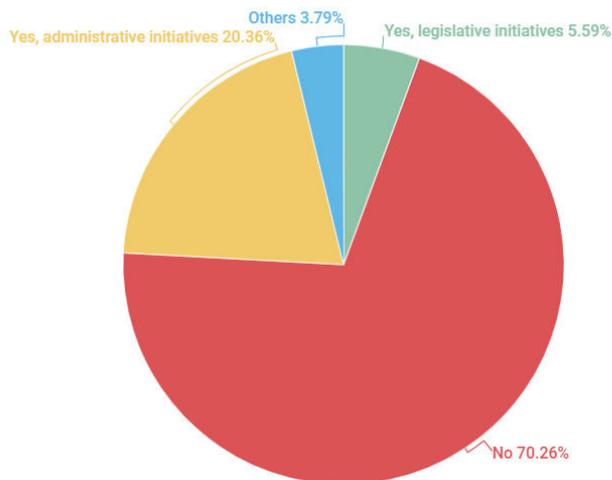
**Figure 41b: Great efficiency of antitrust compliance programs by country**



Even so, in most jurisdictions (70.4% of the respondents), attorneys’ stated that currently there would be no legislative or administrative initiative<sup>121</sup> having the purpose of encouraging the implementation of antitrust compliance programs in their countries. Only 20.4% affirmed that there would be administrative initiatives in place and 5.6% mentioned the existence of legislative initiatives, as Figure 42 shows.

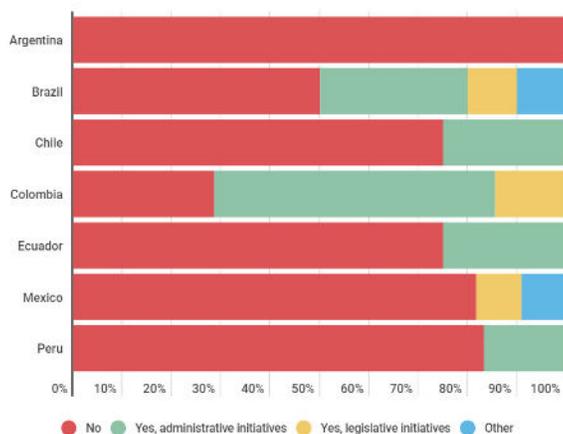
121 Question 28 from the Questionnaire. “28. Is there currently any legislative or administrative initiative that has the purpose of encouraging the implementation of antitrust compliance programs in your country? a. No, b. Yes, legislative initiatives, c. Yes, administrative initiatives, d. Yes, other:”

**Figure 42: Initiatives with the purpose of encouraging the implementation of antitrust compliance programs<sup>122</sup>**



As Figure 43 indicates, in Colombia, and to a lesser extent in Brazil, Chile, and Ecuador, seems to exist some administrative initiatives in course to further encourage the implementation of compliance programs. Nonetheless, in all jurisdictions, except Colombia, the majority of the attorneys affirmed that there is no legislative or administrative initiative that has the purpose of encouraging the implementation of antitrust compliance programs in their country.

**Figure 43: Initiatives with the purpose of encouraging the implementation of antitrust compliance programs<sup>123</sup>**



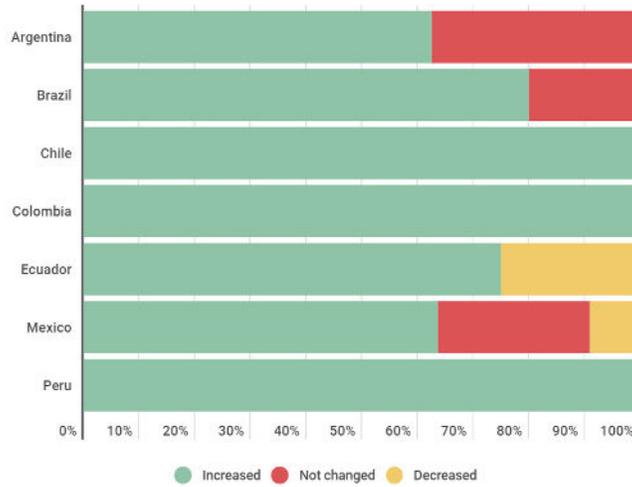
Still, there is hope for improvements in the adoption rate of compliance programs in antitrust matters, as 81.5% of the respondents believe that in the last five years the implementation of antitrust compliance programs by companies in their country has increased.<sup>124</sup> Figure 44 deploys the answers by jurisdiction. Notably, based on the experience of all the attorneys interviewed of Chile, Colombia, and Peru, the adoption rate has increased in the last five years.

122 The option other represents in Brazil “I am not aware of any initiative, but there might be bills in the Brazilian Congress covering this subject” and in Mexico “Proposed future legislative changes”.

123 The option other represents in Mexico “proposed future legislative changes” and in Brazil “I am not aware of any initiative, but there might be bills in the Brazilian Congress covering this subject”.

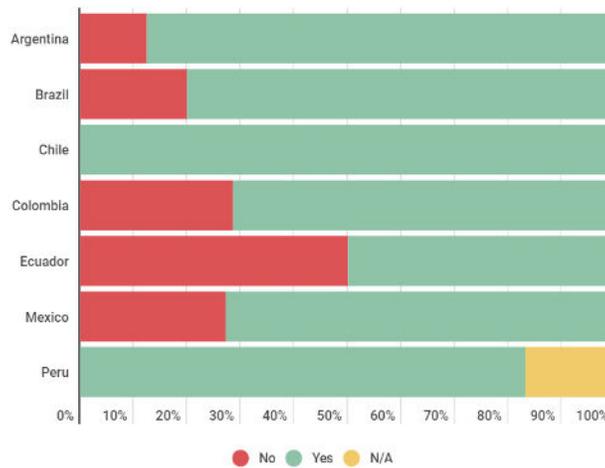
124 Question 29 from the Questionnaire. “29. In relation to the previous five years, do you consider that the implementation of antitrust compliance programs by companies in your country has: a. Increased, b. Not changed, c. Decreased, e. N/A”.

**Figure 44: Increase in the adoption rate of antitrust compliance programs**



Finally, and regarding which variables could help increase the implementation of compliance programs, 79.6% of the respondents affirmed that an increase in the amount of fines or sanctions<sup>125</sup> for anticompetitive conducts could incentivize the implementation of more compliance programs, as Figure 45 shows.

**Figure 45: Effect of an increase in fines and sanctions on the implementation of antitrust compliance programs**



**Box No. 13: Interviews results – Compliance as an agencies’ priority**

When we asked the authorities if the incentive and development of antitrust compliance programs is a priority or if they have future projects to encourage compliance, all the authorities, although with different intensities, stated that this issue is a priority for them.

125 Question 30 from the Questionnaire. “30. Do you consider that an increase in the amount of fines or sanctions for anticompetitive conducts could incentivize the implementation of antitrust compliance programs in your country? a. Yes, an increase in the amount of fines/sanctions could incentivize the implementation, b. No, an increase in the amount of fines/sanctions could not incentivize the implementation, c. N/A”.

For example, the representatives of the authorities from Chile, Mexico, and Brazil highlighted the implementation and development of advocacy courses, trainings or material, in accordance with their efforts to encourage compliance in antitrust matters.

Notably, the Brazilian authority indicated that although compliance is important, this is not the top priority of the authority right now,<sup>126</sup> as it was a few years ago when they issued their guidelines on this matter. The Brazilian authority stated that their efforts are focused on promoting a culture of competition beyond large companies. The authority highlighted the recent creation of a platform which consists of an antitrust compliance course aimed to outreach the general public, small and medium-sized companies.<sup>127</sup>

According to the representative of the Colombian authority, in addition to the recent creation of the Compliance Division within the agency, they have a concrete project in the short term to develop a guideline aimed to orientate companies when identifying their antitrust risks and meet the requirements established in ICONTEC's technical standard.

In the case of the Ecuadorian authority, the SMPC representative stated that they are currently strongly promoting the adoption of compliance programs in the context of cease-and-desist agreements and mergers approvals.

Finally, the representative of the Argentine authority announced that their authority is currently in the process of obtaining international financing in order to develop their own guideline on antitrust compliance.

## ■ VIII. CONCLUSIONS

While enforcing and sanctioning anticompetitive conducts are strong policy tools to promote competitive behavior inside markets and ultimately achieve consumers' welfare, prevention may be an equivalent or, in some cases, even a better tool. From a companies' perspective, prevention should take first place in the scale of priorities, and resolution of failures should be secondary. In that sense, "[t]he concept of compliance and ethics calls for organizations of all forms to engage in self-policing toward this end".<sup>128</sup>

Nowadays, an increasing engagement of antitrust agencies with preventive compliance efforts has emerged. Nonetheless, it is unclear how developed are Latin American countries in promoting and recognizing compliance programs. To fill that gap, we conducted the first Latin American study on the perception of private practice lawyers concerning compliance programs in antitrust matters, which collects information from the most prominent practicing attorneys in seven jurisdictions of Latin America (Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, and Peru) and compare it to the enforcers' opinions on these topics.

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126 Similarly, the representative of the Mexican agency also stated that, although the development of antitrust compliance is a priority for the authority, this is not the number one priority.

127 The Brazilian authority highlighted that this would also serve to face the decrease in leniency applications in recent years, considering that in Brazil and in other Latin American countries there would still be some space to increase local or regional leniency applications in some markets and sectors that are not that aware of competition regulation.

128 Murphy, Joseph E., Policies in Conflict: Undermining Corporate Self-Policing. Rutgers University Law Review (2017), <https://ssrn.com/abstract=3685529>.

This document is divided into three broad categories. The first section aimed to understand how compliance programs are regulated and recognized in each country. The results of the survey show the existence of different sources of regulation of antitrust compliance in each country. For instance, Brazil, Ecuador, Chile, and Peru have specific guidelines issued by antitrust authorities dedicated exclusively to grant orientation on antitrust compliance. In Colombia, the SIC promoted the issuance of a technical standard on antitrust compliance, in Mexico, COFECE has the guideline “Recommendations to Comply with the Federal Law of Economic Competition”, which is one of the main tools that companies in Mexico use to develop compliance programs, and in Argentina, there is no guideline intended to guide on antitrust compliance programs.

Regarding the benefits granted by competition authorities, experiences vary between jurisdictions. In the case of Brazil, Ecuador, Chile, and Peru, although the compliance guidelines of their antitrust agencies explicitly indicate the possibility of granting fines reductions or other benefits to companies that have implemented a compliance program before the infraction (“ex ante compliance programs”), or that commit to implementing a compliance program in the future (“ex post compliance programs”), generally the entity of the benefits -except for the case of Peru, which explicitly indicates the percentage of fine reduction that INDECOPI could grant- and in which cases could be granted, are matters that have been defined case by case and relatively recently by these jurisdictions. In the case of Colombia, the SIC has recently been granting incentives to companies that commit to implementing compliance programs in the future, and in the case of Argentina and Mexico, there seems to be a less clear and defined policy in this regard.

Lastly, in most of the countries under study, there is no specific regulation or precedent that protects legal secrecy in antitrust matters. Noteworthy, most lawyers (82%) believe that the recognition of the legal privilege over compliance programs documents or reports could encourage companies to apply more serious and effective programs. In fact, this could be an area to be evaluated by competition authorities if they intend to increase the adoption and effectiveness of the compliance programs adopted by companies.

The second section aimed to understand the characteristics and level of complexity of the antitrust compliance programs. Digging into the motives that encourage companies to implement compliance programs could help understand if (and which) agencies’ policies could help promote the application of compliance programs. The reasons given by practitioners can be grouped into two categories: related to corporate group policies and directly related to the antitrust regulation and its enforcement by authorities, which gives room for maneuver to the authority.

According to the attorneys’ experience, the elements usually included in compliance programs are the training of executives and managers (92.6%), the development of companies’ antitrust compliance guidelines or manuals (77.8%), and the appointment of a compliance officer (66.7%).

However, important elements such as the periodic internal audits of executive’s communications, the periodic tests of the effectiveness of implemented antitrust compliance programs, and the review of internal disincentives to comply with antitrust regulation (i.e. ambitious performance goals and performance-based salary schemes) did not generate as much consensus as to their general application by companies in the region, which gives scope for improvement in the region.

When asked about the main obstacles for companies to implement complete and serious antitrust compliance programs, two trends can be identified. Answers of attorneys from Chile, Brazil, Ecuador, Mexico, and Peru were more related to decisions or internal actions within the companies, such as the lack of corporate culture and commitment of senior executives and the lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs. In contrast, attorneys from Argentina and Colombia mentioned reasons related to the actions of antitrust agencies- In Argentina, the absence of relevant fines or dissuasive sanctions by antitrust authorities was one of the main reasons mentioned. Also, in Argentina and Colombia, the lack of clear guidelines or precedents by authorities on compliance programs was another important reason.

Despite some differences between jurisdictions, Latin American countries show less development in the participation of

non-lawyers in the implementation of compliance programs and the monitoring within the companies, and in the use of forensic software, algorithms, or artificial intelligence to detect anticompetitive conducts. The main reason adduced is the high cost that implies for companies.

Lastly, the third section delved into the perception of practitioners on the importance and effectiveness of these tools. While for 46.3% of the lawyers, antitrust compliance programs have great effectiveness and they make it possible to early detect anti-competitive behaviors inside companies, the remaining 50% is more skeptical about the level of effectiveness of antitrust compliance programs. However, most of them affirmed that an increase in the amount of fines or sanctions for anticompetitive conducts could incentivize the implementation of compliance programs.

In this vein, when we asked the authorities if the incentive and development of antitrust compliance programs is a priority or if they have future projects to encourage compliance, all of the authorities, although with different intensities, stated that this issue is a priority for them.

All in all, compliance programs are important for competition authorities and practitioners, especially those who advise large corporations. Additionally, most countries have some type of regulation, and the importance of compliance programs has increased over time. However, some areas could be improved. In fact, the regulation could be more specific, especially concerning the effects of compliance programs in the event of an infraction (to what extent and with what intensity they can reduce sanctions), the scope of professional secrecy, the incorporation of periodic reviews and audits (in addition to connections with employee benefit programs) and involvement of economists and screening techniques in compliance programs.

## IX. REFERENCES

Abrantes-Metz, Rosa M. & Metz, Albert D, *Why Screening is a “Must Have” Tool for Effective Antitrust Compliance Programs*, CPI Antitrust Chronicle (November 2019), [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC\\_November\\_II.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC_November_II.pdf).

CADE, *Guidelines for Cease and Desist Agreements for Cartel Cases* (2016), [https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines\\_tcc1.pdf](https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guidelines_tcc1.pdf).

CADE, *Guidelines for Competition Compliance Programs* (2016), <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf>.

CNDC, *Guideline on Defense of Competition for Business Associations and Chambers and Professional Colleges and Associations*, 13 (2018), [https://www.argentina.gob.ar/sites/default/files/guia\\_camaras\\_y\\_asociaciones\\_empresariales\\_10-12-2018\\_0.pdf](https://www.argentina.gob.ar/sites/default/files/guia_camaras_y_asociaciones_empresariales_10-12-2018_0.pdf).

COFECE, *Recommendations to Comply with the Federal Law of Economic Competition* (2019), <https://www.cofece.mx/recomendaciones-para-cumplir-con-la-lfce/>.

DOJ, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (2019), <https://www.justice.gov/atr/page/file/1182001/download>.

European Commission, Directorate-General for Competition, *Compliance matters : what companies can do better to respect EU competition rules*, Publications Office (2013), <https://data.europa.eu/doi/10.2763/60132>.

Fiscalía Nacional Económica, *Trade Associations and Free Competition Guidelines* (2011), [https://www.fne.gob.cl/wp-content/uploads/2011/08/guia\\_-asociaciones\\_-gremiales.pdf](https://www.fne.gob.cl/wp-content/uploads/2011/08/guia_-asociaciones_-gremiales.pdf).

Fiscalía Nacional Económica, *Compliance Programs Guidelines* (2012), <https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf>.

Fiscalía Nacional Económica, *Internal Guidelines for Fine Requests* (2019), <https://www.fne.gob.cl/wp-content/uploads/2019/08/Gu%C3%ADa-de-multas.pdf>.

Harrington, Joseph E., *Cartel screening is for companies, law firms, and economic consultancies, not just competition authorities*, CeCo Investigations (2021), <http://www.centrocompetencia.com/category/investigaciones>.

ICONTEC, *National Technical Standard for the establishment of best practices on the compliance of Colombian competition laws and policies (NTC 6378:2020)* (2020), <https://tienda.icontec.org/gp-requisitos-para-el-establecimiento-de-buenas-practicas-de-proteccion-para-la-libre-competencia-ntc6378-2020.html>.

INDECOPI, *Guideline of Compliance Programs for Free Competition Regulations* (2021), <https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115530-guia-de-programas-de-cumplimiento-de-las-normas-de-libre-competencia>.

Murphy, Joseph E., *Policies in Conflict: Undermining Corporate Self-Policing*. Rutgers University Law Review (2017), <https://ssrn.com/abstract=3685529>.

Murphy & Kolasky, *The Role of Anti-Cartel Compliance Programs in Preventing Cartel Behavior*, 26 ANTITRUST 61 (2012).

OECD, *Executive Summary of the roundtable on Competition Compliance Programmes*, Working Party No. 3 on Co-operation and Enforcement (October 2021), [https://one.oecd.org/document/DAF/COMP/WP3/M\(2021\)1/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2021)1/ANN2/FINAL/en/pdf).

OECD, *Note by Colombia, Working Party No. 3 on Co-operation and Enforcement of the OECD, Competition Compliance Programmes* (May 2021), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)7/en/pdf).

OECD, *Note by Peru, Working Party No. 3 on Co-operation and Enforcement of the OECD, Competition Compliance Programmes* (May 2021), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)22/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)22/en/pdf).

OECD, *Competition Compliance Programmes*, OECD Competition Committee Discussion Paper, 12 (2021), <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>.

Riley, Anne, *Reluctance to Embrace and Recognize Corporate Compliance Efforts*, CPI Antitrust Chronicle (November 2019), [https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC\\_November\\_II.pdf](https://www.competitionpolicyinternational.com/wp-content/uploads/2019/11/AC_November_II.pdf).

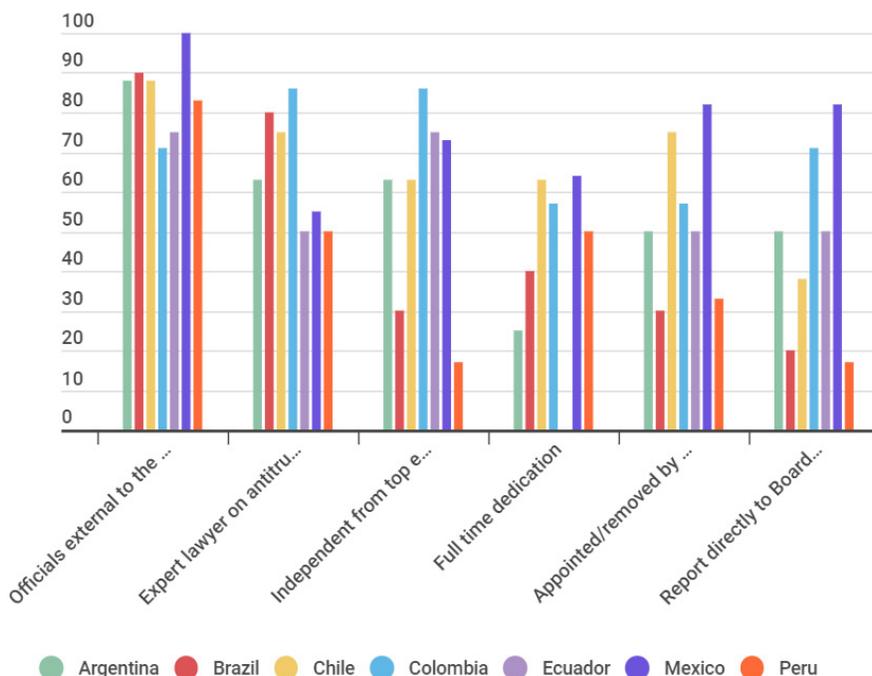
SMPC, *Competition Compliance Guideline* (2021), <https://www.scpm.gob.ec/sitio/wp-content/uploads/2021/09/Guia-Compliance-en-Competencia-SCPM-INAC-DNPC-002-.pdf>.

## X. ANNEX

### a. Elements usually included in antitrust compliance programs by country.

Table 1: Elements usually included in antitrust compliance programs (%)							
	Argentina	Brazil	Chile	Colombia	Ecuador	Mexico	Peru
Anonymous reporting channels		80	88	71		55	83
Designation compliance officer	63	80	88	57			100
Development antitrust compliance guidelines	63	70	88	100	50	73	100
Development of risk analysis			100	57	50		50
Involvement of companies' directors and senior executives			63	57			67
Monitoring mechanisms				57	75		50
Periodic internal audits				57			
Periodic tests of the effectiveness							50
Review internal disincentives to comply							
Training	88	90	100	71	100	100	100

### b. Characteristics compliance officers by country



### c. Summary table by country

Argentina	
Form of initiation of the efforts on implementing compliance programs	Corporate group policies (88%)
Regulation of content of antitrust compliance programs	No (75%)
Position of the antitrust authorities when dealing with compliance programs	No development (62,5%)
Incentives granted	N/A (88%)
Lack of early detection considered as evidence of ineffectiveness	N/A (75%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	5.8
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of application of relevant fines
	Lack of clear guidelines
Use of special software or hire external computer experts (mean 4.4 out of ten)	2.6
Use of algorithms and artificial intelligence (mean 2.6)	1.9
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	8
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	6.3
Efficiency antitrust compliance programs	Not possible to assess in practice (50%)
Increase in the adoption rate of compliance programs	63%
Instances when compliance programs are imposed by agencies (>50%)	Required measure when approving merger
	Result of sanctioning procedure or investigation

Brazil	
Form of initiation of the efforts on implementing compliance programs	Corporate group policies (60%)
Regulation of content of antitrust compliance programs	Yes, guidelines from antitrust authorities (80%)
Position of the antitrust authorities when dealing with compliance programs	Recognize pre-existing programs and could provide some benefits/incentives (70%)
Incentives granted	Liability mitigation (70%)
Lack of early detection considered as evidence of ineffectiveness	Yes (70%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	7
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of protocols and technologies
Use of special software or hire external computer experts (mean 4.4 out of ten)	6.3
Use of algorithms and artificial intelligence (mean 2.6)	3.6
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	9
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	7.2
Efficiency antitrust compliance programs	Great efficiency (60%)
Increase in the adoption rate of compliance programs	80%
Instances when compliance programs are imposed by agencies (>50%)	Result of sanctioning procedure or investigation
	Condition for probation

Chile	
Form of initiation of the efforts on implementing compliance programs	After an industry review of the antitrust authorities (50%)
Regulation of content of antitrust compliance programs	Yes, guidelines from antitrust authorities (88%)
Position of the antitrust authorities when dealing with compliance programs	Offer no benefit, but provide guidance (62,5%)
Incentives granted	Liability mitigation (50%)
Lack of early detection considered as evidence of ineffectiveness	Yes (100%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	6.8
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of compliance officers
Use of special software or hire external computer experts (mean 4.4 out of ten)	3.3
Use of algorithms and artificial intelligence (mean 2.6)	2
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	7.3
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	5.6
Efficiency antitrust compliance programs	Not possible to assess in practice (50%)
Increase in the adoption rate of compliance programs	100%
Instances when compliance programs are imposed by agencies (>50%)	Required measure when approving merger
	Result of sanctioning procedure or investigation
	Condition for probation

Colombia	
Form of initiation of the efforts on implementing compliance programs	After an industry review of the antitrust authorities (57%)
Regulation of content of antitrust compliance programs	No (57%)
Position of the antitrust authorities when dealing with compliance programs	Do not recognize (57%)
Incentives granted	N/A (100%)
Lack of early detection considered as evidence of ineffectiveness	Yes (86%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	5.1
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of clear guidelines
Use of special software or hire external computer experts (mean 4.4 out of ten)	4.3
Use of algorithms and artificial intelligence (mean 2.6)	1.9
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	7.7
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	6.7
Efficiency antitrust compliance programs	Great efficiency (71%)
Increase in the adoption rate of compliance programs	100%
Instances when compliance programs are imposed by agencies (>50%)	Condition for probation

Ecuador	
Form of initiation of the efforts on implementing compliance programs	Corporate group policies (75%)
Regulation of content of antitrust compliance programs	Yes, guidelines from antitrust authorities (75%)
Position of the antitrust authorities when dealing with compliance programs	Recognize pre-existing programs and could provide some benefits/incentives (100%)
Incentives granted	Liability mitigation (75%)
Lack of early detection considered as evidence of ineffectiveness	Yes (50%) and No (50%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	5.5
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of compliance officers
Use of special software or hire external computer experts (mean 4.4 out of ten)	3.5
Use of algorithms and artificial intelligence (mean 2.6)	2.8
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	8
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	4.8
Efficiency antitrust compliance programs	Only serve marginally (75%)
Increase in the adoption rate of compliance programs	75%
Instances when compliance programs are imposed by agencies (>50%)	Required measure when approving merger
	Result of sanctioning procedure or investigation

Mexico	
Form of initiation of the efforts on implementing compliance programs	After an industry review of the antitrust authorities (45%)
Regulation of content of antitrust compliance programs	Yes, guidelines from antitrust authorities (64%)
Position of the antitrust authorities when dealing with compliance programs	Offer no benefit, but provide guidance (55%)
Incentives granted	N/A (55%) and liability mitigation (45%)
Lack of early detection considered as evidence of ineffectiveness	N/A (36%) and No (36%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	7.3
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of budget
Use of special software or hire external computer experts (mean 4.4 out of ten)	5.5
Use of algorithms and artificial intelligence (mean 2.6)	3.4
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	8.4
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	7.8
Efficiency antitrust compliance programs	Great efficiency (50%)
Increase in the adoption rate of compliance programs	64%
Instances when compliance programs are imposed by agencies (>50%)	Required measure when approving merger
	Result of sanctioning procedure or investigation
	Condition for probation

Peru	
Form of initiation of the efforts on implementing compliance programs	After an industry review of the antitrust authorities (50%)
Regulation of content of antitrust compliance programs	Yes, guidelines from antitrust authorities (100%)
Position of the antitrust authorities when dealing with compliance programs	Recognize pre-existing programs and could provide some benefits/incentives (67%)
Incentives granted	Liability mitigation (50%)
Lack of early detection considered as evidence of ineffectiveness	Yes (67%)
Seriousness and comprehensiveness of antitrust compliance programs (mean 6.35 out of ten)	5.8
Main obstacles when implementing complete and serious antitrust compliance programs	Lack of corporate culture
	Lack of compliance officers
	Lack of budget
Use of special software or hire external computer experts (mean 4.4 out of ten)	3.8
Use of algorithms and artificial intelligence (mean 2.6)	2.7
Level of influence of compliance programs adopted by parent companies abroad (mean 8.1 out of ten)	7.7
Follow guidelines or legal precedents of foreign antitrust authorities (mean 6.7 out of ten)	7
Efficiency antitrust compliance programs	Great efficiency (67%)
Increase in the adoption rate of compliance programs	100%
Instances when compliance programs are imposed by agencies (>50%)	Result of sanctioning procedure or investigation
	Condition for probation
	Condition for benefit of leniency

## e. Complete questionnaire

### General information

#### 1. Country in which you currently practice.

- a. Argentina
- b. Brazil
- c. Chile
- d. Colombia
- e. Ecuador
- f. Mexico
- g. Peru

#### 2. What is your age?

- a. 25-35
- b. 35-45
- c. 45-55
- d. 55 or more

#### 3. Have you worked in these sectors?

- a. Private law firm: Yes/No
- b. Antitrust agency: Yes/No
- c. Corporate legal department: Yes/No
- d. Board of directors: Yes/No

#### 4. Which category is most representative of the major part of your antitrust practice? (Please choose one)

- a. Litigation
- b. Advising on mergers and acquisitions
- c. Counseling on compliance programs
- d. Other: \_\_\_\_\_

#### 5. How many years of experience do you have in counseling companies on compliance programs? (Please choose one)

- a. Less than 2 years of experience.
- b. Between 2-5 years of experience.
- c. Between 5-10 years of experience.
- d. More than 10 years of experience.
- e. N/A

#### 6. How much time do you use, as a private attorney, to develop antitrust compliance programs for your clients? (Please choose one)

- a. 0%-25% of my time.
- b. 25%-50% of my time.
- c. 50%-75% of my time.
- d. 75%-100% of my time.
- e. N/A

**7. What is the size of the companies you typically advise? (Please choose one)**

- a. Large corporations (more than 200 employees)
- b. Medium-sized corporations (between 25 and 200 employees)
- c. Small corporations (less than 25 employees)
- d. All of them
- e. Other, including government

**8. In your experience, what is the size of the companies with greater interest in applying antitrust compliance programs? (Please choose one)**

- a. Large multinational corporations (more than 200 employees)
- b. Large national corporations (more than 200 employees)
- c. Medium-sized multinational corporations (between 25 and 200 employees)
- d. Medium-sized national corporations (between 25 and 200 employees)
- e. Small corporations (less than 25 employees)
- f. N/A

**9. In your experience, which markets present a major interest in applying antitrust compliance programs? (you can choose more than one)**

- a. Communications (communication services; media & entertainment)
- b. Energy (Oil & Gas drilling, equipment and services, exploration, production, refining, storage; Coal & Consumable Fuels)
- c. Industrial (capital goods; commercial & professional services; transportation)
- d. Materials (chemicals; mining & metals; construction; paper & forest products; etc.)
- e. Consumer discretionary (automobiles; consumer durables & apparel; retailing; etc.)
- f. Consumer staples (food & staples retailing; food, beverages & tobacco; household & personal products)
- g. Health Care (equipment & services; pharmaceuticals, biotechnology & life sciences)
- h. Financial (banks; diversified financials; insurance)
- i. Information technology (software & services; technology hardware & equipment)
- j. Utilities (electric; gas; water; multi-utilities)
- k. Real Estate (Equity Real Estate Investment Trusts; Real Estate Management & Development)
- l. N/A

**10. In your experience, antitrust compliance efforts implemented by companies of your country usually originate: (Please choose one)**

- a. As part of the corporate group policies, not tied to a specific milestone.
- b. After the industry to which the companies belong has been under the review of the antitrust authorities.
- c. After the company has been sanctioned by the antitrust authorities.
- d. After a reform to the antitrust regulation has been implemented (for example, an increase in the penalties applicable to anti-competitive conducts).
- e. From an obligation imposed by the antitrust authorities.
- f. Other reasons: \_\_\_\_\_
- g. N/A

**11. In your experience, how often do non-lawyer professionals (for example, economists) participate in the design, implementation, or monitoring of antitrust compliance programs applied by companies in your country?**

- a. Never.
- b. Very rarely.
- c. Sometimes.
- d. Always.
- e. N/A

**Legislative and administrative regulation of compliance programs, as well as judicial precedents on the matter.**

**12. Are there any norms, judicial precedents or official guidelines of antitrust authorities that regulate the recognition and content of antitrust compliance programs in your jurisdiction? (You can choose more than one option)**

- a. No
- b. Yes, legal norms
- c. Yes, administrative regulations
- d. Yes, guidelines from antitrust authorities
- e. Yes, judicial precedents
- f. Yes, other \_\_\_\_\_

**13. What is the current position of the antitrust authorities of your country when dealing with compliance programs, based on their most recent pronouncements?**

- a. Authorities recognize pre-existing compliance programs and could provide some benefits/incentives to companies.
- b. Authorities recognize compliance programs only introduced after a violation has occurred.
- c. Authorities offer no benefit, but provide guidance on the content that a compliance program should have.
- d. Authorities do not recognize or credit antitrust compliance programs.
- e. Compliance programs could even be used against a company.
- f. There is no development on this matter.

**14. In case compliance programs are recognized in your country, which of the following benefits or incentives could the antitrust authority grant to companies that apply them? (You can choose more than one)**

- a. The company's liability mitigation (by agreeing to defer prosecution, pursuing lesser charges, or reducing fines).
- b. Recognize the complete liability exemption of the company.
- c. Other benefits, such as preferences in bidding on government contracts.
- d. Other (please specify): \_\_\_\_\_
- e. N/A

**15. Based on previous decisions or guidelines of the antitrust authorities of your country, could the lack of early detection and reporting of anticompetitive behavior before authorities be considered as evidence of the ineffectiveness of a compliance program? (Please choose one)**

- a. Yes.
- b. No.
- c. N/A

### Perception of the level of maturity and development of compliance programs in each country

**16. On a scale of 1 to 10, how serious and comprehensive do you think the antitrust compliance programs applied by companies of your country are?**

1 (very underdeveloped) – 10 (very serious and complete)

**17. In your experience, what are the main obstacles for companies to implement complete and serious antitrust compliance programs? (You can choose more than one option)**

- a. The lack of corporate culture and commitment of senior executives on the importance of complying with antitrust regulations.
- b. The lack of budget allocated by companies to antitrust compliance programs.
- c. The lack of compliance officers or in-house attorneys exclusively dedicated to the implementation of antitrust compliance programs.
- d. The lack of useful and sound protocols/technologies to monitor ordinary course documents to detect potential violations.
- e. The lack of clear guidelines or precedents by authorities on compliance programs.
- f. The lack of application of relevant fines or dissuasive sanctions by antitrust authorities when an anti-competitive behavior is committed.
- g. I do not know the precise obstacles.
- h. Other obstacles (please indicate which ones).

### Content or activities that lawyers usually incorporate into compliance programs and the frequency on which they are implemented

**18. In your experience, which elements are usually included in antitrust compliance programs applied by companies in your country? (You can choose more than one option)**

- a. Training of executives and managers on antitrust regulation and benefits of reporting anticompetitive behavior before authorities.
- b. Periodic internal audits of executive's communications.
- c. Monitoring mechanisms and effective internal sanctions against individuals who commit anticompetitive behavior within the company.
- d. The designation of a compliance officer.
- e. The development of risk analysis based on the particularities of each company and the markets in which they operate.
- f. The involvement of companies' directors and senior executives in the development and implementation of antitrust compliance programs.
- g. The existence of anonymous reporting channels within the company for workers who want to report anticompetitive behaviors.
- h. The development of companies' antitrust compliance guidelines or manuals.
- i. Periodic tests of the effectiveness of implemented antitrust compliance programs through surveys, interviews or internal evaluations.
- j. The review of internal disincentives to comply with antitrust regulation, such as ambitious performance goals and performance based salary schemes.
- k. Others (please indicate which elements).

**19. In your experience, which of the following characteristics usually have the compliance officers appointed by the companies in your country:**

- a. They are officials external to the company: YES / NO
- b. They are expert lawyers on antitrust regulation: YES/NO
- c. They are independent from the top executives of the company: YES/NO
- d. They have full time dedication within the company: YES/NO
- e. They can only be appointed and removed by the company's board of directors: YES/NO
- f. They report directly to the company's Board of Directors: YES/NO

**20. In your experience, how often are antitrust compliance mechanisms reviewed, applied and audited by top company executives, compliance officers or external company advisers? (Please choose one)**

- a. Never.
- b. Only after identifying anticompetitive behaviors within the company.
- c. Very rarely, no more than once a year.
- d. Sometimes, a couple of times a year.
- e. Often, monthly or even weekly.
- f. N/A

**21. On a scale of 1 to 10, in your experience, how often do companies of your country use special software or hire external computer experts or forensic companies to review internal communications in the context of antitrust compliance audits?**

1 (never) - 10 (always)

**22. In relation to internal auditing and monitoring, on a scale of 1 to 10, in your experience, how advanced are the companies of your country in the use of algorithms and artificial intelligence to monitor and detect anti-competitive behaviors?**

1 (there is no development in this matter) - 10 (very advanced)

**Attorney-client privilege protection of antitrust compliance reports issued by lawyers according to the legislation of each country**

**23. Are there any guidelines or precedents from your country's antitrust authority that recognize the attorney-client privilege on antitrust compliance programs adopted by companies?**

- a. There are none.
- b. There are only general guidelines that could be indirectly applied to antitrust compliance programs.
- c. Yes.
- d. N/A

**24. Do you think that recognizing attorney-client privilege on antitrust compliance programs could incentivize companies to apply more serious and effective programs?**

- a. Yes.
- b. No.
- c. N/A.

**Level of interaction between antitrust authorities and practicing attorneys from different jurisdictions in relation to the implementation and assessment of compliance programs.**

**25. On a scale of 1 to 10, what do you think is the level of influence that antitrust compliance programs adopted by parent companies abroad have on the programs applied by subsidiaries in your country?**

1(No influence) – 10 (Total influence)

**26. On a scale of 1 to 10, in your experience, how regularly do companies follow the guidelines or legal precedents of foreign antitrust authorities when designing and adopting their antitrust compliance programs?**

1(Never) – 10 (Always)

**Perception of the degree of importance that compliance programs will have in the future.**

**27. In general terms, what do you think is the level of effectiveness of antitrust compliance programs when it comes to preventing and detecting anticompetitive practices within companies? (Please choose one)**

- a. No efficacy.
- b. Great efficiency, they make it possible to early detect anticompetitive behaviors inside companies.
- c. They only serve marginally, to detect minor infractions.
- d. It is not possible to assess their level of effectiveness in practice.

**28. Is there currently any legislative or administrative initiative that has the purpose of encouraging the implementation of antitrust compliance programs in your country?**

- a. No.
- b. Yes, legislative initiatives.
- c. Yes, administrative initiatives.
- d. Yes, other: \_\_\_\_\_

**29. In relation to the previous five years, do you consider that the implementation of antitrust compliance programs by companies in your country has:**

- a. Increased.
- b. Not changed.
- c. Decreased.
- d. N/A

**30. Do you consider that an increase in the amount of fines or sanctions for anticompetitive conducts could incentivize the implementation of antitrust compliance programs in your country?**

- a. Yes, an increase in the amount of fines/sanctions could incentivize the implementation.
- b. No, an increase in the amount of fines/sanctions could not incentivize the implementation.
- c. N/A

**Compliance programs as obligations imposed by agencies**

**31. Are there any cases in which the antitrust authority of your country has required the implementation of a compliance program to a company?**

- a. No.
- b. Yes.
- c. N/A

**32. If the previous answer is affirmative, in which instances can antitrust authorities of your country impose the implementation of a compliance program on a company? (You can choose more than one option).**

- a. As a result of a sanctioning procedure or investigation for anticompetitive conduct by the company (for example, as an obligation together with the imposition of a fine for a cartel case).
- b. As a condition for probation, a closure of an investigation or a settlement agreement with the antitrust authority.
- c. As a condition for the benefit of leniency.
- d. As a required measure when approving a merger.
- e. In the broader context of the antitrust authority general powers of advocacy.
- f. In other instances (please mention which ones).
- g. N/A



AMERICAN **BAR** ASSOCIATION

Antitrust Law Section



# Antitrust Compliance in Latin America

*Compliance and Ethics Committee of the American Bar Association Antitrust Law Section and  
Competition Center of the Adolfo Ibáñez University in Chile*